No. 3915

United States Circuit Court of Appeals

For the Ninth Circuit

A. MAGNUS SONS COMPANY, a corporation,
Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,
Defendants in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United States for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

FILED
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(In conformity with stipulation of counsel printed at page 130 of this Transcript the caption, title, clerk's endorsements, and other formal matters appearing in the original papers, not material to this hearing, are omitted herefrom.)

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On Writ of Error to the District Court of the United States for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

A. MAGNUS SONS COMPANY, a corporation,
Plaintiff in Error,
vs.
ADAM OREY and W. J. BISHOP,
Defendants in Error.

BE IT REMEMBERED, that on the 19th day of March, 1920, there was filed in the above entitled Court and cause the following

COMPLAINT

Plaintiff complains and for cause of action against the defendants alleges:

I.

That at all times herein mentioned plaintiff was and now is a private corporation organized and existing under the laws of the State of Illinois, and has its principal office and place of business in the City of Chicago, in Cook County, in said State, and is a citizen of and resides in said State of Illinois.

II.

That at all times herein mentioned defendants were and now are citizens and residents of the State of Oregon, and defendant, Adam Orey, resides in Marion County in said state, and defendant, W. J. Bishop, resides in Multnomah County in said state.

III.

That the matter in controversy in this action exceeds, exclusive of interest and costs, the sum of $3000.

IV.

That on or about the 26th day of January, 1917, plaintiff and defendants entered into a contract wherein and whereby, amongst other things, defendants sold to plaintiff sixty thousand pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands therein described, and to deliver said hops in said year at boat landing, depot or on board cars free of charge at such time between the 1st and 31st day of October of said year as the plaintiff may direct; that in and by said contract plaintiff agreed to buy said hops and to advance to defendants $1800 on or about April 1, 1919, and a like amount for picking purposes on or about September 1, 1919, and the remainder due on said hops at the contract price of eleven and one-half (11½) cents per pound upon delivery and acceptance of said hops. That a copy of said contract is hereto annexed, marked Exhibit A, and is hereby made a part of this complaint.

V.

That thereafter on or about March 13, 1919, plaintiff at the request of defendants agreed to increase the contract price to be paid for said hops to sixteen cents per pound.

VI.

That plaintiff in all respects performed all of the terms of said contract on its part to be performed, and on March 29, 1919, advanced to defendants $1800, and on September 4, 1919, $3000 on the purchase price of said hops.

VII.

That defendants raised, grew and harvested 40,000 pounds of hops on said lands in the year 1919, instead of 60,000 pounds, and on or about October 16, 1919, delivered to plaintiff only 29,592 pounds of said crop for which plaintiff paid defendants the contract price in full.

VIII.

That defendants failed and refused to deliver to plaintiff between October 1st and 31st, 1919, as directed by plaintiff, the remainder of the 1919 crop of hops raised and grown by them on said lands, amounting to 10,478 pounds; that defendants have refused to deliver said hops, although demand therefor has been made by plaintiff, and have converted the same to their own use.

IX.

That the market value of said hops at the time and place specified in said contract for the delivery thereof was 85 cents per pound; that by reason of defendants' failure and refusal as aforesaid to make delivery of said 10,478 pounds as provided in said contract, plaintiff has been and is damaged in the sum of $7229.92, being the difference between the contract price and the market price of said hops at said time.

Wherefore, Plaintiff prays for judgment against defendants and each of them for the sum of $7229.92 with interest from October 31, 1919, at the rate of six per cent per annum, besides the costs and disbursements of this action.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

State of Oregon,
Multnomah County,—ss.

I, Thomas G. Greene, being first duly sworn, say I am one of plaintiff's attorneys, and make this verification on its behalf for the reason that none of its officers are within this state; that the foregoing complaint is true as I verily believe.

THOMAS G. GREENE.

Subscribed and sworn to before me this 17th day of March, 1920.

J. L. POTTS,
Notary Public for Oregon.

My commission expires.....

(SEAL)

EXHIBIT "A"

(Annexed to Complaint)

THIS AGREEMENT, Made this 26th day of January, 1917, by and between Adam Orey and W. J. Bishop of Salem, County of Marion and State of Oregon, parties of the first part, and hereinafter also called the seller, and A. Magnus & Sons of Chicago, County of..... and State of Illinois, parties of the second part, and hereinafter also called Buyers.

WITNESSETH: That said Seller, for and in consideration of the sum of One Dollar in hand paid by the Buyers, the receipt whereof is hereby acknowledged do hereby agree to sell and deliver to the Buyers, their executors, administrators, or assigns, Sixty Thousand (60,000) pounds of hops of the crop to be raised and grown by the Seller, in the following year Nineteen hundred and nineteen on the following described real estate, to-wit: Forty-five acres of land now set in hops situated 9 miles North of Salem, Marion County, Oregon, in South Prairie and twenty-four acres of land now set in hops, both known as the Hop Lee ranch in South Prairie and to deliver the said hops in said year at boat landing, depot or on board cars free of charge, at such time between the 1st and 31st day of October of said year as the Buyers may direct.

Each bale of said hops to contain from 180 to 210 pounds of hops (five pounds tare per bale to be allowed), and are to be put up in new bale cloth.

The said hops shall be of prime quality of even color, well and cleanly picked and sprayed and not broken. And the Seller further agrees that this contract shall have preference, both as to quantity and quality, over all other contracts made as to said growth of hops by the Seller with any other purchaser.

The Buyers agree to advance to the Seller Eighteen hundred on or about April 1st Dollars, and for picking purposes on or about the first day of September of said year to enable the Seller to harvest said crop of hops, and prepare the same for market in the manner in which the Seller agrees to harvest and prepare the same, the sum of five cents per pound at Salem, Oregon, provided that at that time no lien superior to the one hereby created exists on said crop of hops; and, provided, further, that before at or during the time of picking of said hops the Buyer shall have the right to examine the condition of the growing hops to determine whether the same are at such time in the condition in which they should be to produce the quality called for by the terms of this agreement; and should there be a dispute or difference of opinion between the Buyers and Seller as to whether the hops will produce the quality called for, such differences shall be decided by two competent persons, one selected by the Buyers and one selected by the Seller, with power to choose an umpire if they do not agree, and their decision shall be conclusive and final; and if it shall be determined that the growing crop is

not in such condition then the Buyers shall be released from any obligation to furnish money as called for by this contract; and such advances as may have been made prior to such determination, with interest at the rate of ....per cent per annum thereon, is hereby made a lien upon such hop crop prior and preferable to all other liens. And upon the delivery and acceptance of said hops, the Buyers will pay in current funds of the United States or their equivalent three and half cents per pound, the balance due on said hops at 11½ cents per pound that being the agreed price for said hops, and all money advanced for the purposes aforesaid, with ....per cent interest to be deducted from the purchase price of said hops.

Should said hops be from any cause of a lesser quality than called for in this contract, the Buyers shall, nevertheless, have the privilege of taking same or so many of them as will cover the amount advanced on said crop, with interest at the rate of ...per cent per annum, at a reduction in price equal to the difference in value between such hops and those by this contract called for.

For the purpose of obtaining the money provided for in this contract, the Seller represents to the Buyers, that they lease the above described property, which is free from all encumbrances, except....and that....made no other contract for the sale of any part of said crop of hops, except....

It is further agreed that the Seller shall keep said hops insured in some responsible insurance

company for their market value, from the time same are picked until delivered, such insurance to be for the benefit of the Buyers and to be made payable to the Buyers as their interests may appear. And should the Seller fail to keep said hops so insured, then the Buyers may insure them, and the money paid for such insurance shall be deducted from the purchase price of said hops.

And it is hereby agreed by and between the parties, that in case of loss of the said hops by fire, wind or otherwise, before delivery, the Seller, their executors, administrators, or assigns, shall and will immediately repay to the Buyers or their heirs or assigns all moneys heretofore paid to the Seller under this contract, with interest at the rate of 7 per cent per annum, from the time such payments were made until the money is repaid.

It is agreed that if the Seller should sell said hops, or any part thereof, in violation of the terms of this agreement to any other person or persons or refuse to deliver the same to the Buyers, as herein agreed, or otherwise fail to perform the terms and conditions of this contract, to be kept and performed by him, the Buyers not being in default, in the terms and conditions to be by them kept and performed the Buyers shall be entitled to receive, in addition to all advances made and interest thereon, as herein specified and agreed, as liquidated and ascertained damages for such breach on the part of the Seller the difference in value between the contract price of said hops, as herein specified

and the market value thereof of the kind and quality in this contract mentioned at Salem, Marion County, Oregon, on the 31st day of October, 1919; and should the Buyers fail on their part to accept and pay for the hops herein agreed to be sold, the Seller not being in default in the terms and conditions to be by him kept and performed, the Seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the Buyers, the difference between the contract price of said hops, as herein specified, and the market value of the kind and quality in this contract mentioned at ....Salem, Marion County, Oregon, on said 31st day of October, 1919.

And inasmuch as the Buyers have agreed to make certain advances under the terms of this contract, relying upon the promises of the Seller herein contained, the Seller for the faithful performance of this contract and as security for the advances which the Buyers may make and for such damages as they, the Buyers, may sustain by reason of the default of the Seller, does hereby bargain, sell, pledge and mortgage to the Buyers the entire crop of hops to be raised upon the premises above described in the year 1919, and does authorize and empower the Buyers, upon such default or breach of the Seller to foreclose this agreement as a mortgage, and it shall be lawful for such person, his agents or assigns to take immediate possession of said property and to sell the same at public auction, after giving notice of the same as is given by the

sheriff on the sale of personal property on execution, and the proceeds of said sale shall be applied to the payment of the reasonable expenses of such sale, including the taking possession of and keeping of such property, and to the payment of all advances and interests thereon, and the damages sustained by the Buyers, together with reasonable attorney fees in any proceeding had in connection with the foreclosure of this lien, and the overplus, if any, shall be paid to the Seller, his assigns or legal representatives.

It is further agreed that the Seller shall not be responsible for any default in the provisions of this contract, excepting to repay advances and interest thereon, by reason of shortage of the crop of hops raised upon said premises, if such shortage be occasioned by unfavorable season and could not be for that reason prevented by him.

IN WITNESS WHEREOF, the parties aforesaid have hereunto set their hands and seals the day and year first above written.

Executed in the presence of:
EARL F. DeLASHMUTT
C. BURLESON

ADAM OREY (Seal)
W. J. BISHOP (Seal)
A. MAGNUS SONS CO.
G. G. SCHUMACHER
Secy. and Treas.

State of Oregon,
County of Yamhill,—ss.

On this 26th day of January, 1917, before me, the undersigned, a Notary Public, personally came, Adam Orey and and W. J. Bishop, to me personally known to be the identical persons described in and who executed the foregoing instrument and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year last above written.

C. BURLESON,
Notary Public for Oregon.

My commission expires October 13, 1919.
(Notarial Seal)

Endorsed: Recorded in Marion County Records Book of Hop Contracts, Vol. 23, page 204, Feb. 16, 1917.

MILDRED R. BROOKS,
County Recorder.

And on April 13, 1920, there was filed to said complaint the following

ANSWER

(The parts of said answer subsequently stricken out on Motion, are, for convenience of reference, italicized and printed in parentheses.)

Come now the defendants and for answer to plaintiff's complaint:

I.

Admit the allegations contained in Paragraphs I, II and III of said complaint.

II.

Admit that the defendants executed the contract annexed to the complaint and marked "Exhibit A", but deny that defendants sold to plaintiff thereby or otherwise 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands described in said contract, or any part of 60,000 pounds of said crop of hops in excess of the actual amount of hops that the defendants were to receive out of the crop grown on said lands *(after the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop rental for the use of said premises, all as is more particularly hereinafter set forth.)*

Admit the allegations contained in Paragraph IV of said complaint, except as the same have hereinbefore been specifically denied.

III.

Admit the allegations contained in Paragraphs V and VI of said complaint.

IV.

Denies that the defendant raised, grew or harvested 40,000 pounds of hops in the year 1919 and in this respect allege:

That approximately 40,000 pounds of hops were grown on said lands in said year by the defendants *(and one, Hop Lee, the owner of said lands and the lessor of said lands to the defendants, the lessees thereof, under a crop rental lease.)*

Admit that the defendants delivered to plaintiff 29,-592 pounds of hops and no more and that plaintiff paid defendants the contract price therefor.

V.

Deny each and every allegation contained in Paragraph VIII of said complaint, except that defendants admit they have refused to deliver to plaintiff any hops in excess of 29,592 pounds and admit that demand for such delivery has been made upon them by plaintiff.

VI.

Deny each and every allegation contained in Paragraph IX of said complaint.

And for a first, further and separate answer and defense to plaintiff's complaint, defendants allege:

I.

(That during the year 1919 they leased from one Hop Lee, the owner thereof, the lands described in the contract attached to plaintiff's complaint as "Exhibit A," under a lease by the terms of which the defendants were entitled to the use and possession of said lands during the year 1919 for the purpose of raising and growing thereon a crop of hops with a rental reserved to the owner

of said lands of one-fourth of all of the hops grown during said year 1919 thereon.)

II.

That the contract between plaintiff and defendants, dated January 27, 1917, and attached to plaintiff's complaint as an exhibit thereto, was executed by the defendants and the plaintiff on or about the date thereof and was intended to, and did in fact, provide for the sale and purchase of all of the hops of the crop to be raised on the premises described therein during the year 1919 and grown by the defendants *(and was not intended to, and in fact did not, include one-fourth part of the crop of hops, grown on said premises during the year 1919, belonging to and grown by Hop Lee, the owner of said premises, as a tenant in common with the defendants of the crop of hops grown by the said Hop Lee and the defendants jointly on said premises during said year.)*

III.

That prior to the date on which said contract was entered into between the plaintiff and the defendants, the plaintiff knew that the premises described in said contract were leased by the defendants from the said Hop Lee under a lease whereby the said Hop Lee was entitled to retain one-fourth part of said crop and was a joint tenant with the defendants in the production and ownership thereof. *(That it is inequitable to the rights of the defendants that the plaintiff should now be permitted to contend for a construction of said con-*

tract by virtue of which the defendants are obligated to sell and deliver to the plaintiff all of the hops produced on said premises, including the hops of the said Hop Lee, to which the defendants had no estate, right, title or interest.)

IV.

(That in truth and in fact the agreement between the plaintiff and the defendants with respect to the sale of the crop of hops to be grown on said premises was intended to be and was an agreement on the part of the defendants to sell to the plaintiff as many pounds of hops not in excess of 60,000 pounds as might be grown and harvested by the defendants alone, on and from said premises during the year 1919 and including only that part of the hops grown on said premises of which the defendants were the owners and to the delivery of which the defendants were to become entitled after there had been retained by Hop Lee, the owner of said prmises, one-fourth part of the total crop produced thereon by him and by the defendants jointly to which one-fourth part said owner was entitled under the terms of the lease hereinbefore set forth.)

V.

That there were raised and grown by the defendants on said premises during the year 1919, 29,592 pounds of hops and no more and that said hops were the only hops which the defendants were entitled to receive or did receive from the hops grown on said premises or in or to

which the defendants or either of them had any right, title or interest.

VI.

(That in justice and in equity defendants are entitled to a construction of said contract under and by virtue of which no obligation will be imposed upon them to sell or to deliver to the plaintiff any hops, produced on said premises during the year 1919, in excess of the hops raised and grown by the defendants and of which they were the owners and to the possession of which they were entitled, to-wit, 29,592 pounds of hops. And that if said contract as now written, by reason of the inadvertence and mistake of the parties in reducing the same to writing and thereby failing to set forth in writing their intentions and actual agreements, is not susceptible of the construction herein contended for, defendants are entitled to a reformation of said contract so that the same will be reformed under decree of this Court so as to impose no obligation on the part of the defendants beyond the obligation which they assumed and which it was the intention of the plaintiff and defendants to define and create by said contract.)

And for a second, further and separate answer and defense to plaintiff's complaint, defendants allege:

I.

That during all the times herein mentioned, and for many years prior hereto, a usage and custom has existed in the hop business in the State of Oregon, with

which both the plaintiff and the defendants were and are familiar, and subject to which usage and custom, the contract, which forms the subject matter of this litigation, was entered into, that hop ranches should be leased upon a crop rental rather than upon a cash rental basis.

II.

The contract, which forms the subject matter of this litigation, contains a specific recital that the defendants leased the premises described in said contract.

III.

That the hop industry in the State of Oregon, by reason of the violent fluctuations in the price of hops, which can not be forseen with reasonable prevision, is a highly speculative one on account of which fact a usage and custom developed and for a long time has existed by which the producer of hops will not contract for future delivery a definite number of pounds thereof, but with respect to any contract for future delivery will limit his obligation to sell and deliver so many hops only as may be produced from definite tracts of land and to the ownership of which the seller, under all conditions and irrespective of fluctuations in price, will be entitled at the time his obligation to deliver to the buyer becomes a present one.

IV.

That by reason of the customs and usages hereinbefore set forth, and the express knowledge of the parties

to said contract of the fact that the defendants were lessees of the premises described in said contract, it was the intention of the parties to said contract to provide for the sale and delivery to the plaintiff of only so many pounds of hops not in excess of 60,000 pounds as might be produced on said premises during 1919 of which the defendants were the owners.

V.

That there were produced on said premises during the year 1919, 29,592 pounds of hops and no more of which the defendants were the owners or in or to which they or either of them had any estate, right, title or interest and that all of said hops were delivered by defendants to the plaintiff in full and complete performance by them of the obligation contained in the contract between them and the plaintiff.

VI.

That in justice and in equity and by reason of the existence of the customs and usages hereinbefore set forth and the intentions of the parties to said contract arising therefrom, said contract should be so construed by this Court as to impose upon the defendants no obligation to deliver to the plaintiff any hops in excess of said 29,592 pounds thereof produced and owned by them as has been hereinbefore alleged.

WHEREFORE defendants pray that the plaintiff may take nothing on account of its action, that it be decreed that they have fully performed all obligations imposed upon them by the contract between them and

the plaintiffs as written, or in the event that a reformation of said contract be necessary to protect the equitable rights of the defendants, that said contract be reformed and re-written by this Court so as to impose no obligation upon the defendants to deliver to the plaintiff any hops grown on said premises during the year 1919 in excess of that part of the crop of which the defendants were the owners and that they have a decree for their costs and disbursements herein.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

To the foregoing answer there was interposed the following

MOTION TO STRIKE AND DEMURRER

Plaintiff moves for an order separately to strike from defendants' answer the following portions thereof for the reason that the same and each thereof are irrelevant, and immaterial, viz:

1. The following language in the last four lines of paragraph II, page 1: "After the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop rental for the use of said premises, all as is more particularly hereinafter set forth."

2. The following language in lines 7 to 9, page 2: "and one Hop Lee, the owner of said lands and the lessor of said lands to the defendants, the lessees thereof, under a crop rental lease."

3. All of paragraph I of the first further and separate answer on page 2.

4. All of paragraph II, page 3, of said first separate answer beginning in line 8 and reading as follows: "and was not intended to, and in fact did not, include one-fourth part of the crop of hops, grown on said premises during the year 1919, belonging to and grown by Hop Lee, the owner of said premises, as a tenant in common with the defendants of the crop of hops grown by the said Hop Lee and the defendants jointly on said premises during said year."

5. All that portion of paragraph III, page 3, beginning with the word "That" in line 22.

6. All of paragraphs IV and VI of said first separate answer.

Nos. 5 and 6 for the additional reason that the matter therein moved against states mere conclusions and presents no issuable facts.

And not waiving the foregoing motion, but in addition thereto, plaintiff demurs:

1. To the first further and separate defense set up in said answer. (*Transcript,* pp. 14-17, *supra.*)

2. To the second further and separate defense set up in said answer. (*Transcript,* pp. 17-19, *supra.*)

For the reasons that neither of them state facts sufficient to constitute a defense to said complaint.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

Thereafter argument of counsel for the parties upon said motion and demurrer was submitted, and on August 15, 1921, District Judge R. S. Bean decided the same in the following

MEMORANDUM OPINION

R. S. BEAN, District Judge: (ORAL)

This is an action to recover damages for an alleged failure to deliver hops in pursuance of a written contract. It appears from the complaint that defendants agreed to sell and deliver to plaintiff 60,000 pounds of hops of the crop to be raised and grown by them during the year 1919 on certain described property. The contract was to have preference over all others concerning the hops, made by these sellers. Plaintiff was to advance $1800.00 in the spring, and for picking purposes five cents per pound the first of September. These advances were made. Defendants raised about 40,000 pounds of hops but delivered to plaintiff only some 29,000 pounds. This action is brought to recover damages for failure to deliver the balance.

Defendants in their answer alleged, among other things, that they were lessees under a contract by the terms of which they were required to deliver a certain part of the hops to the landlord, that they did make such delivery, and delivered the remainder to plaintiff, which they claim was a compliance with their contract.

The contract itself, however, is very definite and certain. It provides for the delivery of a certain number of pounds of hops, of the crops grown by defendants during a certain year on certain premises. There were no exceptions in the contract. Indeed, it indicates all the way through that the parties intended the delivery of 60,000 pounds of hops if that quantity was grown by defendants during the year. This is indicated very

clearly by the fact that in September, 1919, plaintiff made an advance under the contract of $3000.00 which was five cents a pound on 60,000 pounds.

It is true where the terms of a contract are ambiguous parol evidence is admissible to explain its terms. Thus where a contract stipulated that a lessee should pay to the lessor one-half the proceeds of the crops produced the courts held that parol evidence is admissible to determine whether the word proceeds was net proceeds or gross proceeds. There are no such ambiguities in the contract in suit.

It is also alleged in the answer that at the time the contract was made there was a custom known to the seller and purchaser of hops that where the seller was a lessee a part of the crop necessarily went to the landlord, and that this should be construed with reference to that custom. A custom may be important in the interpretation of a contract, but it cannot be resorted to for the purpose of varying or adding to the plain language of the instrument. I take it, therefore, the motion to strike out the allegations of the answer with reference to the obligation of the defendants to their landlord and the delivery of hops to him, and the custom prevailing at the time the contract was made should be allowed.

It is also alleged or stated in the answer that the contract as written and signed, by mistake omitted the condition that defendants should not be required to deliver to plaintiff the landlord's portion of the hops. It is true that in this court the defendant in a law action may set up an equitable defense but the answer does not

go far enough to do so. It does not allege what the original contract was or that by mutual mistake the provisions permitting the delivery of hops to the landlord was omitted, and without allegation of that kind the answer would not be sufficient to justify a decree reforming the contract.

The demurrer to the answer is sustained, with leave to amend if the defendants so elect.

And on August 15, 1921, there was entered the following

ORDER

This cause was heard by the court upon the motion to strike out parts of the answer and the demurrer to the answer herein, plaintiff appearing by Mr. Thomas G. Greene of counsel, and defendants by Mr. G. L. Buland of counsel, upon consideration whereof

IT IS ORDERED that said motion to strike out be and the same is hereby allowed, and that said demurrer to the answer herein be and the same is hereby sustained, with leave to the defendants to amend said answer if they so elect.

And thereafter on October 17, 1921, there was filed the following

AMENDED ANSWER

Come now the defendants in the above entitled court and cause, and as an amended answer, leave of court having been first had and obtained, to plaintiff's complaint, admit, deny and allege as follows:

I.

Admit the allegations contained in Paragraphs I, II and III of said complaint.

II.

Deny each and every allegation contained in Paragraph IV of said complaint, except that the defendants admit that plaintiff and defendants executed the writing set forth as Exhibit "A" to plaintiff's complaint on or about the 26th day of January, 1917, and defendants admit that a copy of said writing is annexed as Exhibit "A" to said complaint, and defendants further admit that by the terms of said writing, defendants and plaintiff were to do the acts set forth in said paragraph, except that defendants deny that they sold to plaintiff thereby, or otherwise, 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands described in said contract, or any part of 60,000 pounds of said crop of hops in excess of the actual amount of hops that the defendants were to receive as their share of the crop grown on said lands.

III.

Admit the allegations contained in Paragraphs V and VI thereof.

IV.

Deny each and every allegation contained in Paragraph 7 except that defendants admit that defendants delivered 29,592 pounds of hops to plaintiff and no more,

and that plaintiff paid the defendants the contract price therefor.

V.

Deny each and every allegation contained in Paragraph VIII of said complaint, except that defendants admit that they have refused to deliver to plaintiff any hops in excess of 29,592 pounds, and admit that demand for such delivery has been made upon them by plaintiff.

VI.

Deny each and every allegation contained in Paragraph 9 of said complaint.

DEFENDANTS FOR A FURTHER AND AFFIRMATIVE Answer and Defense allege:

I.

That during the year 1919 and at the time at which the writing set forth in plaintiff's complaint was executed, the defendants had under lease from one Hop Lee, the owner thereof, the lands described in said writing, and by the terms of said lease defendants were entitled to the use and possession of said lands for the purpose of raising hops thereon, and from the crop of hops grown thereon they were to receive three-fourths thereof and said Hop Lee, as a crop rental was to receive one-fourth of said hops.

II.

That prior to the execution of the writing set forth

in plaintiff's complaint, negotiations were carried on between defendants, acting through their agent, A. C. Bishop, and plaintiff, at Chicago, Ill., for the contracting of said defendants' share in the crop to be raised in 1919 on the premises described in said writing.

III.

That as a culmination of said negotiations, an agreement was entered into by and between plaintiff and defendants for the purchase by said plaintiff from defendants of 60,000 pounds of so much of the hops to be grown in 1919 on the premises described in Exhibit "A" to plaintiff's complaint, to which the defendants would become entitled by the terms of the lease held by them of said premises as set forth in Paragraph I hereof. By said agreement, 60,000 pounds of hops were to be delivered by defendants to plaintiff if the defendants' share in the hops grown on said premises should be equal to, or in excess of, that amount, but in case defendants' share should amount to less than 60,000 pounds because of a shortage of crop, then defendants should deliver the full amount of their share of said crop. By said agreement defendants further agreed to mortgage to plaintiff their entire share of said crop to secure advances made by plaintiff to them. The further terms of said agreement, not relating to the description of the hops sold by defendants to plaintiff, were as expressed in the writing attached as Exhibit "A" to plaintiff's complaint.

IV.

That thereafter said agreement was reduced to writ-

ing, which writing was executed by the defendants in the State of Oregon, where said writing was prepared.

V.

That said writing prepared as above stated is set forth as Exhibit "A" to plaintiff's complaint; that by reason of the mutual mistake and inadvertence of the plaintiff and defendants in reducing said agreement to writing, said writing did not, and does not, express the true agreement and understanding of the parties thereto in that the description of the hops sold to plaintiff by defendants as contained in said writing is as follows: "60,000 pounds of hops of the crop to be raised and grown by the seller in the following year, 1919, on the following described real estate," and the description contained in said writing of the crop to be mortgaged by defendants to plaintiff is as follows: "The entire crop of hops to be raised upon the premises above described in the year 1919," which descriptions of the hops covered by said contract were, by reason of the mutual mistake and inadvertence of the parties, erroneous, and to make said descriptions conform to the true agreement and understanding of the parties as said agreement is set forth in Paragraph III hereof, said provisions should be reformed and rewritten by this court, so that the description of the hops to be sold by defendants to plaintiff should read as follows: "60,000 pounds of hops of the seller's share of the crop to be raised and grown in the following year 1919, on the following described real property," and the description of the hops to be mortgaged by defendants to plaintiff should read as follows:

"The seller's share of the crop of hops to be raised upon the premises above described in the year 1919."

VI.

That the writing set forth in Exhibit "A" to plaintiff's complaint was prepared on a printed form procured from a legal blank publisher of Salem, Oregon, which said printed form contained in print the provisions in regard to the hops covered by said contract, and said parties filled out the blanks in said contract without changing the printed matter providing for the hops covered by said contract, and it was by reason of the use of this printed form as aforesaid that the said mutual mistake of plaintiff and defendants in the description of said hops occurred: The said mistake in the description of the hops covered by said agreement did not arise on account of the negligence of defendants, for the reason that the defendants were induced to use said printed form without changing the description of the hops covered thereby, because said printed form was in common use among hop raisers and hop dealers in the State of Oregon, and was commonly and customarily used to cover the sale of any interest in a crop of hops without change of the printed words describing the hops sold, and defendants were further induced in this regard by the fact that it was the custom and usage in the hop business in the State of Oregon, with which usage and custom both the plaintiff and defendants were familiar, not to sell hops on a speculative basis, and not to contract for the sale of hops for future delivery except for so many hops as would be produced, and to which the seller

would become entitled from certain described land, and defendants were further induced to use said printed form without change in said printed words for the reason that similar provisions in regard to the hops sold had been contained in other contracts between plaintiff and defendants, and said plaintiff had given a practical construction thereto by not requesting or requiring the defendants to deliver that portion of the crop of hops raised on the premises mentioned in the contract, to which the landlord became entitled by reason of a crop rental.

VII.

That defendants did not discover said mistake in said writing, and were not aware that under the terms of said writing, contention could be made that they were obligated to deliver to plaintiff the share of the hops grown on said premises belonging to said Hop Lee on account of said lease, until the plaintiff demanded said hops shortly before the bringing of this action.

VIII.

That due to shortage of crop the defendants' share of the hops grown on the premises described in Exhibit "A" to plaintiff's complaint during the year 1919 was 29,592 pounds and no more, which hops, and the entire amount thereof, defendants delivered to plaintiff in accordance with the true agreement and understanding of the parties.

WHEREFORE defendants pray that plaintiff take nothing by its complaint herein, and that the writing set forth as Exhibit "A" to plaintiff's complaint be

reformed and rewritten in accordance with the true agreement and understanding of the parties as aforesaid, and that defendants do have and recover their costs and disbursements of and from the plaintiff.

DEY, HAMPTON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

To the foregoing Amended Answer, on October 31, 1921, there was filed the following

REPLY

Now comes the plaintiff and for reply to the amended answer of defendants, admits, denies and alleges as follows:

I.

Denies that it has any knowledge or information sufficient to form a belief as to any of the matters and things alleged in paragraph I of the further and affirmative answer and defense set up in said amended answer and therefore denies the same and the whole thereof.

II.

Admits that prior to the execution of the contract set forth in the complaint negotiations were carried on between plaintiff and defendants, but denies that there was any mention or reference to defendants' alleged share in the crop to be raised in 1919 on the premises described in said writing, but alleges that said negotia-

tions were wholly with respect to the entire crop of hops to be given in 1919 on said premises.

III.

Denies paragraphs III, IV, V, VI, VII and VIII of said affirmative answer.

WHEREFORE plaintiff demands judgment as prayed for in its complaint.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

Thereafter on January 9, 1922, said cause came on regularly for trial on the equity side of said court before the Honorable Chas. E. Wolverton, a judge of said court, upon the affirmative answer and defense set up in said amended answer.

And on January 10, 1922, upon the conclusion of said trial, and after delivering the memorandum opinion set out at pages 35 to 38 of this transcript, said court made, signed and filed the following

ORDER

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the hearing of this cause upon the further and separate defense in the answer of said defendants is resumed; and the court, having heard the evidence adduced, and the arguments of counsel, and being now fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the prayer of the further separate answer and defense in the answer of said defendants for a reformation of the

contract set out in the complaint herein be and the same is hereby denied, and that said further separate answer and defense be and the same is hereby dismissed. Thereupon,

IT IS ORDERED that this cause be and the same is hereby continued for further trial as an action at law.

And thereafter on January 11, 1922, said cause went to trial as an action at law before the same judge and jury, and at the conclusion thereof on the 12th day of January, 1922, the following

JUDGMENT ORDER

was made and entered therein, to-wit:

Now at this day came the parties hereto by their counsel as of yesterday, whereupon the jury empaneled herein being present and answering to their names, the trial of this cause was resumed, whereupon said jury having heard the evidence adduced, upon motion of plaintiff for a directed verdict in favor of said plaintiff,

IT IS ORDERED that said motion be and the same is hereby denied, and therefrom upon motion of defendants for a directed verdict in their favor,

IT IS ORDERED that said motion of defendants be and the same is hereby allowed. Whereupon without retiring from the jury box, said jury, by direction of the court, returns the following verdict, viz.:

"We, the jury empanelled in the above entitled court and cause, under the direction of the court, return our verdict for the defendants and against the plaintiff.

R. L. Weatherford, Foreman."

which verdict is received by the court and ordered to be filed. Whereupon on motion of plaintiff

IT IS ORDERED that it be and is hereby allowed thirty days from this date to move for a new trial herein. And thereupon on motion of said defendants for judgment upon the verdict

It is adjudged that said plaintiff take nothing by this action and that said defendants do have and recover of and from said plaintiff their costs and disbursements taxed in the sum of $56.60 and that execution issue therefor.

And thereafter on April 25, 1922, and within the time fixed by order of said court therefor, there was served, tendered and lodged with the clerk of said court the following

BILL OF EXCEPTIONS

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

A. MAGNUS SONS COMPANY,
a Corporation,
Plaintiff,

vs.

ADAM OREY AND W. J. BISHOP,
Defendants.

BE IT REMEMBERED that the above entitled cause came on regularly for trial, at a stated term of said court held at Portland, in and for the State and District of Oregon, before Honorable Charles E. Wol-

verton, District Judge, on the 9th day of January, 1922, as a suit in Equity and on the Equity side of said court on the issues presented by the further and affirmative answer and defense in defendants' amended answer, and reply thereto, the plaintiff appearing by G. G. Schumacher, its Secretary and Treasurer and by its attorneys, Bauer, Greene & McCurtain, Thomas G. Greene of counsel, defendants appearing in person and by their attorneys, Dey, Hampson & Nelson, Alfred A. Hampson and G. L. Buland of counsel.

Thereupon the parties called witnesses to maintain and prove the issues on their respective parts on the equitable defense set up in defendants' said amended answer, and the said Court, after hearing the testimony, and the argument of counsel, delivered the following decision:

WOLVERTON, District Judge (Orally):

The claim for reformation of the contract in this case is based upon a mutual mistake of the parties. I think there is no doubt that the sellers did make a mistake, or at least they were not careful enough in drawing their contract; but the plaintiff made no mistake. There has been no showing that there was a mistake on the part of the purchaser in the formation of this contract. The contract was written here by the sellers, and it was sent back to Chicago, and received there by the buyer, and the buyer signed it.

There is no testimony here at all showing that there was any mistake made on the part of the buyer, and, in cases of this kind, the testimony must show by clear evidence that there was a mutual mistake between the

parties. In such a case as that, the court will reform the instrument; otherwise, it will not; and I do not think, in this case, that the testimony supports a cause for reformation on the ground of mutual mistake. The equity case, therefore, will have to be dismissed.

As to the practice which should obtain, I think the case that has been cited, namely, Union Pacific R. Co. v. Syas, 246 Fed. 561, is one that this court ought to follow. That was a case, as counsel will remember, where the plaintiff sued for damages that had been received by him, and the defendant set up that there had been a settlement as to the damages. The plaintiff replied that the settlement was obtained through fraud. Then the question came up as to whether or not that presented a case which should be tried in equity, because of the fact, as alleged, that the settlement had been obtained through fraud. The court there held that the matter set up in the reply was matter for equitable relief, and should have been first tried and disposed of on the equitable side of the court. That was because of the statute of March 3, 1915, which reads:

> "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication."

It was under that clause that the court held that the equitable matter set up in the reply should be first tried on the equity side of the court, and disposed of by the court. Then if the court found that the facts were as alleged by the plaintiff in the reply, that would have the effect of setting aside the settlement, and that would be as far as the court could go on the equity side. Thereupon the case would be referred to the law side of the court, and there tried out.

This is such a case as that, only that the answer here sets up an equitable matter, and in the reply that equitable matter is denied. That presents to this court an equitable defense, and that should be tried out in equity. Then the question as to whether the case should be further tried in law or in equity should be resolved in favor of the trial proceeding on the law side of the court.

Now, there is another case which is decided by the same Circuit Court of Appeals. It is the case of Fay v. Hill, 249 Fed. 415. The court says there:

> "But, aside from this, if there had been a transfer to the law side of the court, and the bill treated as an answer to the action at law, if it stated an equitable defense, it would have had to be disposed of by the court, sitting as a chancellor, before the trial of the action at law to a jury; and if upon such a hearing the equitable defense had been sustained there would be nothing left to try to a jury."

The Syas case is then cited, and it is followed.

The practice in our state court is practically to the same effect, and I simply cite counsel to section 390 of the Oregon Laws. I suppose, from the language of the

court in the Syas case, that the laws of Colorado were taken into consideration; and I assume that those laws are about the same as the laws in the State of Oregon. At least, the court has come to the conclusion that the case must proceed in equity until the equitable matter is determined in that forum, and then it will depend on how that matter is determined whether the case goes back to the law side of the court. If the decision of the court on the equity side is decisive of the controversy, that ends the case. If it is not decisive of the controversy, then the case goes back to the law side of the court, to be there tried out, and determined by a jury, unless the parties waive a jury. I decide that feature of it now, and the case will be remitted to the law side of the court; the court having found against the equities as set up by the answer.

And thereafter, on the 10th day of January, 1922, in pursuance of said decision of the court, there was duly signed and entered in said cause, a decree as follows (omitting formal parts):

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the hearing of this cause upon the further and separate defense in the answer of said defendants is resumed; that the court, having heard the evidence adduced and the argument of counsel, and being now fully advised in the premises

IT IS ORDERED AND ADJUDGED that the prayer in the further and separate answer and defense in the answer of the said defendants for a reformation of the contract set out in the complaint herein be and the same is hereby denied, and that said further and

separate answer and defense be and the same is hereby dismissed.

IT IS ORDERED that this cause be and the same is hereby continued for further trial as an action at law.

CHAS. E. WOLVERTON,
Judge.

THEREUPON in conformity to said decree a jury was empanelled and on the 11th day of January, 1922, said cause went to trial before the same judge and a jury as an action at law on the remaining issues therein as presented by the complaint and denials of the amended answer, the same parties and their respective counsel being present, and the following proceedings were had, to-wit:

To maintain and prove the issues on its part plaintiff called as a witness

G. G. SCHUMACHER, who, being first duly sworn, testified as follows:

Am Secretary and Treasurer of A. Magnus Sons Company, Chicago, plaintiff in this case, who buys and sells hops in practically all of the American markets. The market price of hops at Salem, Oregon, on October 31, 1919, was 85 cents a pound, or thereabouts. Plaintiff made purchase near that time.

FRANK S. JOHNSON, a witness called by the plaintiff, being first duly sworn, testified as follows:

I am a member of Frank S. Johnson Company, hop dealers, and have been in that business in Oregon about 22 years. The market price of hops at Salem, Oregon, on October 22, 1919, was around 85 cents a pound. That

price was paid then. I don't believe it went more than 86½ cents for a few lots. It was around 85 to 86 cents. I would say from October 22nd on down to October 31, 1919, the price ran from 85 cents to 86 cents per pound. That was the maximum.

Thereupon it was stipulated and agreed by and between plaintiff and defendant in open court that the total amount of hops grown and picked by defendants on the lands described in the contract sued upon during the year 1919 was 38,429 pounds net weight, of which 28,882 pounds net weight were delivered by defendants to plaintiff on said contract, and 9607 pounds net weight remain undelivered.

Plaintiff then rested its case.

To maintain and prove the issues on their part defendants thereupon called as a witness

W. J. BISHOP, who, being first duly sworn, testified as follows:

I am one of the defendants in this case and live in Portland. Was formerly in business in Marion County, Oregon. Have been in the hop business a long time, as a grower of hops, and have leased lands for the purpose of growing hops. Had lands under lease in 1916 for that purpose. Have known of plaintiff company for twenty years and have met all of the Magnusses connected with it, both in Oregon and back East. Representatives of that company were quite frequently in Oregon, and they came in contact with growers and producers of hops and dealers in hops, on the occasions of their visits.

Question (by Mr. HAMPSON): And has that

condition endured during the period of your knowledge of the firm?

MR. GREENE (for the plaintiff): If your Honor please, I supposed this was introductory and preliminary. If it is not, I object to it on the ground it is immaterial, pertinent to no issue in this case. This is a dispute about one particular contract, not a course of dealings, and therefore this testimony is not relevant and I object to it on that ground.

THE COURT: I will overrule the objection for the present. We will see where it leads to.

(EXCEPTION NO. 1)

Q. (by MR. HAMPSON): What can you say, Mr. Bishop, as to the knowledge that existed on the part of the Magnuses you knew with respect to the customs and usages of the hop business in Oregon, and the manner in which that business was carried on?

A. They had a thorough knowledge.

MR. GREENE: I want to interpose an objection. This witness is not competent to testify to the knowledge some other man has of the hop business or anything else. That is a conclusion.

THE COURT: I think you better draw out the facts as they exist as to the Magnuses' knowledge, and not what this man might say as to their knowledge.

Continuing, the witness then testified that he had occasion to converse with Albert Magnus and August Magnus at different times prior to January, 1917, with Albert Magnus in Oregon, and with August Magnus in Chicago, relating to the hop industry.

Q. (by MR. HAMPSON): What aspects of the hop business were covered in your conversations with them?

MR. GREENE: Objected to. Apparently there has enough been drawn out now to show where this is leading, and I want to interpose an objection.

THE COURT: You object to showing the custom?

MR. GREENE: I object to proof by this witness of knowledge on the part of Albert Magnus or August Magnus, or anybody else of custom. I also object to proof of custom, on the ground that you cannot prove custom or usage to impress a new term into, or take a term out of, or to vary a term in, an express written contract.

THE COURT: I have this view on that proposition: In the first place, I will say that this contract has to be construed by the court.

MR. GREENE: Yes, if it needs construction.

THE COURT: Yes, if it needs construction. And the custom, if one prevailed at that time, might be important to put the court in place of the parties, and to get in touch with the surrounding circumstances and conditions, in order to determine what interpretation should be placed upon this contract.

MR. GREENE: I will admit that, your Honor, if there was any term or provision in that contract that was vague or ambiguous; but if there is not, then the court has no function of being in their places or knowing the surrounding circumstances and conditions. They have made their own contract, free from fraud and free

from mistake, and without duress; and if it is plain and definite and unambiguous, then there is no room for interpretation. The court cannot import any new terms into it by usage or custom. Judge Bean says of the contract that it is definite, certain, unambiguous, on the very issue that is now attempted to be injected into this trial. I feel that I am bound by that. And I am prepared to be heard with citations from our own Supreme Court, or anywhere else, that this is a character of contract that cannot be varied by proof of custom and usage.

COURT: I have read that opinion of Judge Bean's and gone into it pretty thoroughly, and I might say, further, I have consulted with Judge Bean about it, and I am of the opinion that that decision does not decide the exact question that is now before us.

MR. GREENE: Didn't that decide that they could not plead a custom and usage to vary that particular hop contract?

COURT: I agree with him about that absolutely, because there is no question about it. But the purpose of introducing the custom here is to aid the court in interpreting the contract; that is to say, to give the court the position of the parties at the time and the condition that prevailed at the time, so that the court may be better enabled to say what the parties meant when they drew this contract and when they entered into it.

MR. GREENE: Wherein did they fail to express what they meant, though? It seems to me plain enough. They agreed to sell 60,000 pounds of hops, the entire crop raised on certain land. How can that be denied?

You cannot change entire crop to three-quarters of crop by custom and usage.

COURT: There is another view to that. A man is not presumed to sell something that he hasn't, or never had.

MR. GREENE: That is the point where I think we differ. This is not a contest between Magnus and the Chinaman—the landlord. We are not trying to take the landlord's hops away from him. If we had brought our suit in replevin and replevined the Chinaman's hops, and he was the defendant in here on that kind of suit, then this would be relevant. The Chinaman could say, "You have no right to my hops. I got them from Bishop and Orey as my rent. My title is better than yours, because I have possession." But that is not the issue here.

MR. GREENE: If your Honor please, in addition to the objections I noted this morning to the testimony of the witness on the stand, there are two others I wish to make.

I object to the question, on the grounds, in addition to the grounds already stated, that there has as yet been no proof of any custom or usage in this case. Obviously, therefore, it is unfair to attempt to fasten knowledge on the plaintiff of some vague, indefinite custom and usage, that has not yet been testified to by anybody in this case; and the second ground is, in addition to the others urged, that no custom and usage are pleaded. The testimony sought for out of this witness is incompetent for that reason.

Now, I have said that it is not pleaded. It was

pleaded in the original answer filed in this case, while it was a law action. All of this matter concerning usage and custom and crop rentals was set up. To that portion of that answer, we introduced demurrers and motions, and it was stricken out, and demurrers sustained as to all that matter in the original answer. Then the amended answer was filed, consisting, first, of such denials as the pleader saw fit to make to the complaint, and then, as a further and separate answer and defense, the equitable defense which has already been tried and determined by this court, and dircted to be dismissed.

COURT: The objection will be overruled. But I will say, as to this matter of custom and usage, the custom was set up in the original answer, and that was stricken out by Judge Bean, so that matter is not now in the pleadings, so far as the law action is concerned. The defendants in this case have amended their answer, and set up an equitable defense, and in that custom and usage were pleaded. The court, as you know, heard that equitable defense, and found, after hearing testimony, that the proof did not sustain the answer, and that disposed of the equitable matter, and with that, it disposed of the equitable answer. So there is no custom pleaded here now. I doubt very much whether the matter of custom has a great deal to do with the case. But I think the court and the jury are entitled to the situation of the parties, and they are entitled to have also what knowledge the parties had of the local situation, and I will permit that to be shown. But I don't think that the defendants are entitled to show a custom or usage under the present state of the case.

MR. HAMPSON: In order that we may be clear on this point, I will say that the defendants intend to offer proof of the existence of a custom in Oregon with respect to the leasing of lands for the purpose of growing hops, under which such leases are made on a crop rental basis. Now, that testimony can be offered as proof of a custom, or it can be offered as a fact, and the knowledge of that fact as being within the parties. It is immaterial to me how that gets into the case, but I think we are entitled to have that fact in the case. If your Honor is going to exclude such testimony upon the ground that it tends to prove a custom, and that that custom has not been pleaded, and therefore the testimony is not admissible, at this time I would ask permission to amend our answer in order to set forth such plea as would justify the receipt of such testimony. If, on the other hand your Honor is going to rule that such testimony is admissible as disclosing a fact, one to be considered in view of others, tending to show the situation of the parties and the nature of the subject-matter of this contract, then I am perfectly willing to proceed without an amendment of the pleadings.

COURT: If you amended your answer, it would have to be amended in such a way as to meet the objection that Judge Bean has ruled upon in this case, because that becomes the law of the case now. I could not permit you to amend so as to set up the same matter that he has stricken out.

MR. HAMPSON: I would not undertake, your Honor, to amend this answer to run counter to the decision of Judge Bean—obviously not. I concede that I

am controlled by that decision, and in so far as Judge Bean has passed upon that, it does constitute the law of the case.

COURT: I think for the present I will have to hold that the custom is not a matter that can be proven here—the general custom and usage in the locality. I will overrule the objection to this question, and let the witness proceed.

To which ruling plaintiff then and there duly excepted and its exception was allowed.

The witness thereupon answered: Well, we went over all the aspects of the business—contracts, and buying hops, and growers' contracts, and dealers' contracts. We talked over the business generally.

THE COURT: By the way, wasn't there a stipulation in this case that the seller was to receive 16 cents a pound?

MR. GREENE: Yes.

THE COURT: That didn't get before the jury.

MR. GREENE: No. I think it ought to be explained to the jury, that while the contract calls for 11½ cents a pound, subsequently that term of the contract was modified, by mutual consent of both parties, so that Magnus agreed to pay 16 cents a pound instead of 11½ cents a pound. The stipulation was made on account of complaint by Mr. Bishop at picking time that, on account of the war and scarcity of labor, the price of pickers had gone up some. To meet that difficulty, Magnus conceded an additional 4½ cents.

The witness then testified: Adam Orey was associated with me in growing hops in 1916. At that time

we were cropping or held under lease five hop yards. We usually contracted or sold outright the hops grown by us in our yards. My brother, who was an employee, made a trip for me in the latter part of 1916 to sell hops. He left about December 1st and went to Chicago and New York, and called on the firm of A. Magnus Sons Company. I received a telegram from him in regard to what took place there. In 1916 and the early part of 1917, I was located in McMinnville, Oregon, and left there about June or July, 1917. I kept our records in the office there, and must have brought some of them down to Portland in a box, but evidently I misplaced them or threw them out, or something, when I left McMinnville. Have made search for them and have none of them now. Have made search for the telegram from my brother under instructions of my attorney (Mr. Hampson). Have not been able to discover it. My brother wired me in January, 1917, that Magnus was interested in three year, or term contracts, and to take it up direct; he was coming home.

Am familiar with, and in 1917 had knowledge in regard to the 45-acre tract of land situated nine miles North of Salem, in the South Prairie, owned by Hop Lee. Am also familiar with a 24-acre tract of land in the South Prairie, and was familiar therewith in 1917. The two tracts are known as the Chung and Stevens yards, respectively, and are known as the Hop Lee ranch. The 45-acre tract is the Chung yard, the 24-acre tract is the Stevens yard. Hop Lee was the owner in 1917.

(EXCEPTION NO. 2)

Q. Do you know who had the lease of those lands in 1916?

MR. GREENE: Objected to as immaterial who had the lease or anything about it. When it comes to a question of lease, I am going to object to it as immaterial, not relevant to any issue in this case. We are suing on a written contract, in which defendants covenant they have leases on these lands. We are bound by that. We admit they had leases on these lands. Everything else concerning the leases is immaterial.

Whereupon the court overruled said objection, to which ruling plaintiff duly excepted and its exception was allowed.

A. Yes, sir.

(EXCEPTION NO. 3)

Q. Who?

A. Adam Orey and W. J. Bishop.

Q. Were the leases written leases or oral leases?

MR. GREENE: Same objection as to last preceding question. Which objection was overruled by the court, and an exception to such ruling was thereupon taken and allowed.

A. The Chung yard was a written lease and the Stevens yard was an oral lease. I have been unable to find the written lease on the Chung yard although I have made an attempt to do so.

The witness continuing: I inquired of Hop Lee whether he could discover one of the originals and he

sent me up to two or three attorneys' offices in Salem to look through papers he had there, but we were unable to find them. The five years, 1915 to 1919, inclusive, were covered by the Chung yard lease.

(EXCEPTION NO. 4)

Q. What were the terms of that lease with respect to the rent to be paid to the owner, Hop Lee?

MR. GREENE: I want to renew my objection that it is immaterial and irrelevant to any issue in this case, as to the terms of that lease. They covenanted to raise these hops on leased lands and that is admitted. That is all we think relevant.

Whereupon the court overruled said objection and an exception to such ruling was taken and allowed.

A. Yes, Hop Lee was to get one-fourth of the hop crop, and we were to get three-fourths of the crop each year.

(EXCEPTION NO. 5)

Q. And what did the lease provide in a general way about the use to which the land was to be devoted?

To which question plaintiff objected on the ground that the same was immaterial and irrelevant, and the court overruled the objection, and an exception to such ruling was taken and allowed.

A. Devoted to raising hops.

Thereupon counsel for plaintiff, in order to avoid interruption by interposing separate objections to each of this line of questions, suggested that it be understood

that his objection might go to all interrogatories respecting those leases and the terms thereof.

MR. HAMPSON: My feeling about a matter of that kind is this, your Honor: That in what may be a more or less extended examination, there is an opportunity for a question to be asked and answered which is perhaps, technically, not proper, and with a general objection of that kind, there is created a possibility of error on some more or less immaterial and inconsiderable point.

MR. GREENE: Very well. I will make the objections, and I wish you would caution your witness.

MR. HAMPSON: Yes. I did speak to him at noon. I caution you not to answer my question immediately, but to give Mr. Greene an opportunity to object and permit the court to rule on it.

(EXCEPTION NO. 6)

Q. Now, state what the terms of the oral lease on the Stevens yard were?

To which question plaintiff objected on the ground that the same was immaterial and irrelevant. Said objection was overruled and an exception taken to such ruling of the court was taken and allowed.

A. Hop Lee was to get one-fourth for rent of the place, and we were to get three-fourths.

(EXCEPTION NO. 7)

Q. And in a general way, did that lease provide for the use of the land for the purpose of cultivating and raising hops?

To which question plaintiff objected on the ground that the same was immaterial and irrelevant. Said objection was overruled and an exception to such ruling was taken and allowed.

A. Yes, sir.

Witness then testified: After I received the telegram from my brother in Chicago I went to Salem, saw Hop Lee, and told him we were about to sell the hops for a term of three years, and it would be necessary to change the oral lease into a written lease, so there would be no argument about it, and I effected a written lease with Hop Lee covering the Stevens yard.

(EXCEPTION NO. 8)

Q. I call your attention to this written instrument, and ask whether that is the lease?

A. Yes, sir.

Q. Please state whose signatures those are attached to the lease?

A. Hop Lee's, Adam Orey and myself.

Counsel for defendants then offered, as defendants' Exhibit I, a written lease, dated January 24th, 1917, between Hop Lee as owner and Adam Orey and W. J. Bishop.

Plaintiff objected thereto as irrelevant and immaterial, and its objection was overruled. An exception to the ruling of the court was taken and allowed.

Said defendants' Exhibit I is as follows:

THIS MEMORANDUM OF AGREEMENT made and entered into in duplicate this 24th day of Jan-

uary, 1917, by and between Hop Lee, of Salem, Oregon, hereinafter known as the lessor, which term shall include his heirs, executors, administrators and legal representatives, and Adam Orey and W. J. Bishop, of Salem, Oregon, hereinafter known as the lessees, which term shall include their heirs, executors, administrators and legal representatives, WITNESSETH:

That for and in consideration of the annual rental to be paid by the lessees to the lessor as hereinafter provided, as well as in the observance of the conditions, covenants and stipulations herein contained to be observed upon the part of the parties herein, the lessor agrees to rent, let and lease to the lessees, and the lessees agree to take, lease, and rent from the lessor those certain farm premises belonging to the lessor situated in South Prairie Bottom, about eight miles north of Salem, in Marion County, Oregon, said property being commonly known as "The old John Hamilton place"—and containing about 31 acres of land more or less, said property to include the hop house, dwelling house, hop kiln and other buildings situated upon said real premises, to have and to hold the above described property unto the lessees for the period of five (5) years, to-wit: from January 24, 1917, until January 24, 1922, subject of course to the conditions herein contained.

It is understood by the parties herein that there is situated upon said real property a hop yard consisting of some 21 or 22 acres of land, and the lessees herein agree to tend, handle, manage and operate said hop yard during the continuance of this lease, and they agree that in the handling and operating of the same to plow, har-

row, cultivate and care for the same in a good husbandman-like manner and in a manner approved by successful hop growers in the vicinity in which said real premises are situated. Said property is to be plowed and harrowed each way not less than twice a year and such additional times as the lessees feel necessary to care for the same in the manner above provided. The wiring of said hop yard and the placing of the necessary poles to keep the same in good condition, grubbing and hoeing the said yard shall be looked after by the lessees in order that said yard may receive proper attention. The lessees also agree to spray the hops raised on said property at seasonable times each year during the life of this lease, and all teams, tools, implements, labor, spraying material or whatever else necessary in the caring, growing and harvesting of said hops shall be furnished by the lessees herein without any expense upon the part of the lessor, except as herein specifically provided.

The lessees are to have the use of the dwelling house now situated upon said real property as well as all other buildings located thereon and said lessees shall have the right and permission to cut from the timber upon said property all wood necessary to be used by them for fuel purposes or for the purpose of drying and caring for the hops as well as such poles and material necessary to be used in the said hop yard, or in the fences surrounding or subdividing said property. It is agreed that should the fences or any of the buildings located upon said real property require repairing during the life of this lease, that the lessor shall furnish the necessary material to

be used for said purposes and the lessees shall perform the work necessary in the repair of said fences or buildings without cost to the lessor.

As rental for the use and enjoyment of said property the lessees shall deliver to the lessor one-fourth (¼) of all hops produced from said real premises each year during the life of this lease, and said hops are to be baled by the lessees before delivery and shall be delivered by them at one of the near-by boat landings in Marion County, Oregon, at a time designated by the lessor.

The lessees shall not assign nor transfer this lease without the written permission of the lessor first had and obtained. Either of the parties herein shall have the right to insure their hops which are upon said real premises at any time, but the expense of said insurance shall be borne by the party who carries such insurance. The lessor shall have the right to enter upon said real property at any time for the purpose of inspecting the same.

On condition that the covenants of this lease are observed upon the part of the lessees they shall have peaceful possession of said real property and all and every part thereof and of the buildings located thereon during the continuance of this lease, and at the expiration of this lease they shall surrender up possession of said real property to the lessor without any written notice to vacate the same to which they might be entitled by law. The said lessees shall commit no unnecessary waste or damage, or suffer the same to be committed to said property during the life of this lease.

IN WITNESS WHEREOF we have hereunto set

our hands and seals this the day and year first above written.

Hop Lee, Lessor.
Adam Orey,
W. J. Bishop, Lessees.

Witness then testified: The old John Hamilton place, referred to in said lease, is the same tract of land referred to as the Stevens yard.

(EXCEPTION NO. 9)

Q. State whether or not, Mr. Bishop, during the years 1917, 1918 and 1919, covered by this written lease, and during the same years covered by the written lease on the Chung yard, Orey and Bishop did or did not deliver to Hop Lee one-fourth of the hops grown on those yards?

To which question plaintiff objected on the ground that the same was irrelevant and immaterial. The objection was overruled and an exception to such ruling was taken and allowed.

The witness answered: We delivered one-fourth of the hops to Hop Lee during each of the years 1917, 1918 and 1919.

(EXCEPTION NO. 10)

Q. Now, Mr. Bishop, after the negotiation and execution of that lease, what did you next do with respect to entering into the contract on which this law-suit is now being brought?

Said question was objected to by plaintiff as incompetent, irrelevant and immaterial. The objection was

overruled and an exception to the ruling was taken and allowed.

A. I went back to McMinnville, and by telegram, offered the hops to Magnus, that is, our hops we had grown. I wired Magnus January 24, 1917, when I got back from Salem, after writing up the lease with Hop Lee.

(EXCEPTION NO. 11)

MR. HAMPSON: I now offer that in evidence as defendants' Exhibit 2.

MR. GREENE: Objected to as incompetent, irrelevant and immaterial. Here is a written contract entered into by the parties. Unless a mistake is shown, that is not in issue here, unless the validity of the contract is questioned, that is not in issue here,—no testimony in regard to preceding negotiations is admissible. On that ground we will object to it.

THE COURT: The objection is overruled. And the court is allowing this to go in evidence, not for the purpose of proving what the contract is, but for the purpose of informing the court and jury as to the condition and situation of the parties prior to entering into this contract, and to show the circumstances which led up to the contract, and all for the purpose of enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into.

MR. GREENE: I appreciate, of course, the reason on which your Honor admits it, and your Honor

will appreciate my reasons for preserving my record. And then I will interpose an objection to it on that ground, for the reason that the contract pleaded here and admitted is not susceptible of interpretation or construction; and these documents or any other evidence of extraneous matters preceding the execution of the contract is not necessary for that purpose.

Plaintiff's objection was overruled, and an exception to the court's ruling was taken and allowed.

Said defendants' Exhibit 2 was read in evidence as follows:

"McMinnville Org 23

Stamped

1917 Jan 24 AM 1 15

A. Magnus and Sons

Randolph Chicago Ill.

We offer you sixty thousand pounds three years at eleven half FOB our own leased yard written on regular growers contract mentioning primes yard we wish to sell heavy producer always spray and usually produces prime to choice quality was contracted Hugo Lewi last year Rosenwald year before. Wire direct

Bishop Bros."

Continuing, the witness said: I had the Chung and Stevens yards, which together form the Hop Lee ranch, in mind when the contract described in this law-suit was written. Those yards are located in South Prairie Bottom. By bottom I mean there are two classes of hop yard, bottom lands and uplands yards. During normal years the production of bottom hop lands is usually

about 1500 pounds to the acre. When I sent the telegram to Magnus I was familiar with the capacity of the Hop Lee ranch under normal conditions.

(EXCEPTION NO. 12)

Q. State what the capacity of the Hop Lee ranch was?

To this question plaintiff objected on the ground that the same was irrelevant and immaterial. The court overruled said objection and an exception to such ruling was taken and allowed.

The witness answered. There was something over 60,000 pounds on the Chung yard the year before. I don't know the exact production of the Stevens yard, but it was always known as a heavy yard. I know that the crop had never been picked in entirety until we ran the yard. The capacity of the two yards together under normal conditions is from eighty thousand to one hundred thousand pounds. I am familiar with the technical phrases used by hop men in the transaction of their business.

(EXCEPTION NO. 13)

Q. In this telegram, the phrase "regular growers contract" is used. Has that, or has it not, a technical meaning in the hop business?

MR. GREENE: Objected to as incompetent, irrelevant and immaterial. That word does not appear in the contract in suit, and moreover, it does not need an interpretation.

The court overruled said objection and an exception

to the ruling was taken and delivered.

A. It has a technical meaning.

(EXCEPTION NO. 14)

Q. Are there other contracts than regular growers contracts used in the hop business?

To which question plaintiff objected as irrelevant and the court overruled said objection. An exception to said ruling was duly taken and allowed.

A. Yes, sir.

(EXCEPTION NO. 15)

Q. And what is the term used to designate the latter class of contracts?

Plaintiff's objection to this question as irrelevant was overruled by the court and an exception was taken and allowed.

A. Dealers contracts.

(EXCEPTION NO. 16)

Q. What is the meaning in the hop business—and by the hop business, I mean among the buyers and sellers of and dealers generally in hops—of the term "regular growers contract?"

Plaintiff objected to this question as irrelevant. The court overruled the objection and an exception to the ruling was taken and allowed.

A. That means that the grower is selling hops off an identical piece of ground.

THE COURT: Does that mean that they are selling hops to be grown?

A. To be grown on an identical piece of ground. If a grower signs a contract to that effect, he is signing the hops which he has title to on that identical piece of ground.

(EXCEPTION NO. 17)

Q. And wherein is such a contract different from a dealer's contract?

Plaintiff objected to this question as immaterial and irrelevant and the court overruled the objection. An exception to such ruling was taken and allowed.

A. A dealer's contract is a contract between two dealers, when no specific ground is mentioned. He can either raise the hops himself or go out on the market and buy them, or get them given to him,—any way, as long as he produces the identical amount as specified in the contract. A dealer's contract is one which covers an obligation to deliver a definite quantity of hops at all hazards. A regular grower's contract has a clause in it to the effect that an unfavorable season that could not be prevented by him, he is responsible for no more hops than he has title to on the yard, and that he grows.

MR. GREENE: Do I understand you to say that particular language is in all grower's contracts?

WITNESS: All grower's contracts, yes, sir.

THE COURT: There is a clause in this contract somewhat to that effect, but not in that language.

MR. GREENE: No, that "title to".

THE COURT: I think this contract would govern as to that.

(EXCEPTION NO. 18)

The witness then testified to receiving an answer to his telegram (Defendant's Exhibit 2), and said answer was offered in evidence as Defendant's Exhibit 3. Plaintiff objected thereto on the ground that communications and negotiations leading to a contract are merged in the written instrument and are irrelevant and inadmissible.

The court overruled said objection and an exception to the ruling was taken and allowed.

Said defendants' Exhibit 3 is as follows:

"Chicago, Ill., January 24, 1917.

Bishop Bros.
McMinnville, Oregon.

We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and a half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample.

A. Magnus Sons Company."

(EXCEPTION NO. 19)

Plaintiff then moved to strike out the Exhibit on the ground that it is not addressed to and does not concern defendants in this case, who are W. J. Bishop and Adam Orey; and moved separately to strike out both telegrams on the ground that they do not refer to the contract the defendants in this case admit having made.

The court overruled said motions and an exception to said ruling was noted and allowed.

The witness then testified: After receipt of this telegram, I wrote up the contracts and forwarded them to plaintiff. I know what the printed instrument now shown to me is. The signatures of Adam Orey, W. J. Bishop and G. G. Schumacher, are attached to it. I obtained the printed form for it in the stationery stores at Salem.

The document was introduced in evidence as defendants' Exhibit 4, and is identical with the contract referred to in the complaint and annexed thereto as Exhibit A. (Pages 5 to 11, *supra,* this Transcript.)

The witness then testified that contracts generally similar to Defendants' Exhibit 4 and covering the same land were prepared covering the years 1917 and 1918. After I secured form of contract from the stationery store in Salem, I took the forms back to McMinnville and wrote up the contract. It is in my handwriting. I signed them and Adam Orey signed them, and I then sent them to Magnus at Chicago. They were in duplicate and after they were signed A. Magnus Sons Company, G. G. Schumacher, Secretary and Treasurer, they were returned to me and I had the originals recorded and then sent them back to A. Magnus Sons Company and kept the duplicate. Myself and Mr. Orey cultivated the Hop Lee ranch described in the contract to hops during 1917, 1918 and 1919, and produced crops of hops. The hops produced in 1919 were baled up, taken to the warehouse at Hopmere, the railway station nearest to the ranch, and divided. Hop Lee and Adam Orey divided

them. The bales were lined up, we took three bales and Hop Lee took one bale, and so on until they were all divided, and until Hop Lee got his one-quarter for rent. The remaining three-quarters were shipped to A. Magnus Sons Company, either to it or to some brewer by its direction.

Counsel for defendants then made an offer of proof by the witness as follows:

MR. HAMPSON: At this time, and by this witness, the defendants offer to show that in connection with the operation of hop lands in the State of Oregon, and the conduct of the hop business in the State of Oregon, it is customary and usual for such lands to be rented or leased by the owner to tenants or lessees, on a crop rented basis; and that such crop rental leases are customary, practically to the exclusion of cash leases, or leases of any other character, to the degree of 90 per cent or 95 per cent of all leases made being crop rental leases rather than leases of any other kind. And defendants further offer to show by this witness that Magnus Sons Company had knowledge of the existence of this custom, usage or fact.

MR. GREENE: You don't want to offer the amount of rental, do you?

MR. HAMPSON: Further, in this connection, defendants offer to prove that the rental usually paid under such leases was one-quarter of the crop, although the percentage of the crop so paid as rental was subject to change under varying conditions.

The court sustained plaintiff's objection to the introduction of such testimony.

CROSS-EXAMINATION:

Witness testified that they produced a few bales over 200 in 1919 and shipped 150 and some odd bales to Magnus or their order. Could not state exactly how many. Turned over fifty odd bales to Hop Lee. My definition of a grower's contract is a contract for his hops raised on a particular and specific piece of ground for a particular year. That is all I wish to say about it. I don't know how many pounds of hops the Chung yard or the Stevens yard produced in 1919, because we dried them all in the same house. The two together in normal years produce 80,000 to 100,000 pounds of hops. They produced about 40,000 pounds in 1919. The 1918 crop was only half picked. In 1917 they produced about 50,000 pounds, in 1920 about 50,000 pounds and in 1921 in the neighborhood of 50,000 pounds. 1917 was a very abnormal year, very dry. We got 50,000 pounds that year. In 1918 the hops were left on the vines, which absolutely ruined the yards. We have never been able to get the roots to grow since. In 1916 they produced about 60,000 pounds. I don't know just to the pound how much the Chung yard produced. Under normal conditions means normal climatic conditions, and normal working conditions. We haven't had that kind of normal conditions since 1916, nor since the war started. In my telegram to plaintiff (Defendants' Exhibit 2) by "our own leased yards" I referred to the yards which our A. C. Bishop had talked to the Magnuses in Chicago about. He had wired me, and I had already instructed him before he left here what to talk about. We were operating five leased yards that year, on crop

rental, four in Marion County and one in Polk County. I told my brother to solicit the business of A. Magnus Sons Company on the Orey and Bishop yards. I signed the telegram Bishop Bros. as that is my usual way of doing business. George Bishop is my brother and was a partner in Bishop Bros. but he had nothing to do with these hop yards. His name was not signed to the contracts. Did not explain to Magnus why it was not. Myself and Adam Orey had already signed the contracts on January 26, 1917, when we sent them to Magnus for signature. I wrote a letter which accompanied the contracts.

The letter, which was read in evidence by the witness and marked Plaintiff's Exhibit A, is as follows:

> "Inclosed find contracts for 3 years for 60,000 lbs. on the Chinaman's yards we are running. Kindly sign duplicates and forward back to us. You can use your own judgment about recording them, if you want you can save that expense. We have sold both to Rosenwald and Hugo Lewi several years and they saved the expense. Contracting is active. Wolk Hop Co. took 40 thousand from Geo. Yergen at 11½ and have offered this and 12 to several growers. Other dealers are offering 11 all for one year.
>
> Bishop Bros."

By the expression in the letter "the Chinaman's yards we are running," I meant these five hop yards we were working, all on crop rental, and the same amount and proportion of rental. I had conversations with August Magnus and Albert Magnus, with Albert Magnus

in Salem along in 1913, or '14 or '15. I don't know what year but it was before these contracts. We talked about hop business in general, I don't believe there was any discussion of buying or selling. I was representing Bishop Bros. as a hop buyer at the time. I have been in the hop business for 20 years as buyer, seller and commission merchant, part of the time representing La Vie & Company, who are big buyers in this market. Mr. La Vie is my uncle. Am quite famiilar with hop contracts and the making of them, have filled out many of them, not many dealer's contracts. My experience has been with grower's contracts similar to this one. At the same time, for the last seven or eight years, I have been leasing and operating yards. Never bought any hops of Hop Lee before. He always had them sold when I got around. When we were turning over to him-one-fourth of the hops we raised on his land he had them sold for five years. I do not know to whom. I talked with August Magnus in Chicago some years before these contracts were signed, in 1914, '15 or '16, about hops and of the business in general, condition of the crop, prices, etc. Made an effort to sell him some old hops, the previous year's crop, in 1916, but he was not interested in hops at all. Our talk was of the hop business in general, shop talk between dealers in the same business. The only thing I recall is that I was trying to sell Mr. Magnus six or seven thousand bales of old hops that had been laying here for a couple of years. Have no recollection of any reference in that conversation as to whether the hops had been grown on renter's land or owner's land. Mr. Magnus was not interested in any of

it when I talked to him. He was sick. Subsequently, later on, he wrote some contracts, the contracts in this suit and other contracts. I had not a very strong acquaintance with them. I merely dropped in when I went through Chicago, possibly for an hour or two; and met them for an hour or two when they were in Oregon. Albert Magnus was here two times to my knowledge within the past 20 years. I talked to him both times possibly an hour alone. He is the only Magnus I ever talked to on the Coast; saw August Magnus only at his office in Chicago. I talked to Albert Magnus here in latter part of August, 1919, after this contract was executed, that is the time he allowed the increase in the price, all dealers were allowing the increase. We had not picked the hops yet, or were just starting to pick.

A. C. BISHOP was thereupon called as a witness for defendants, and being first duly sworn, testified as follows:

I am a brother of W. J. Bishop who was just on the witness stand. Have been employed by him. First went to work for him 10 years ago and have been in his employ continuously except two years I was in France. Was employed by him in 1916 and part of 1917. My duties were to buy, sell, help work in the yards. Went East four trips to New York. Made a trip East in December, 1916.

(EXCEPTION NO. 20)

Q. And what were you instructed to do by your brother in connection with that trip?

Plaintiff objected to said question as irrelevant and

immaterial. The objection was overruled and an exception was taken and allowed to the ruling of the court.

A. I had a number of hops under my arm—samples, and order to sell; also had orders to sell some contracts, which was grown on Orey and Bishop's yards, and other yards, to sell them to dealers in the East. If they were in position to take them I would have closed the deal right there, and did close a couple of deals. By closing a deal I mean arranging a contract, and wiring my brother, and the taking care of it, and taking it up direct with them.

Continuing the witness said: I was in Chicago during that trip, on my return from the East, between the 10th and 15th of January, 1917. I left New York after New Years, don't recall the exact date. I know the firm of A. Magnus Sons Company, on Randolph street in Chicago. I called there to try to sell them some hops. I saw three of the Magnusses and was introduced to Mr. Schumacher. Conversed with the Magnusses about the hop business in general, also spot hops and contract hops. Spot hops are hops of the previous years's crop, on hand and in the bale at that time.

(EXCEPTION NO. 21)

Q. And what do you mean by contract hops? What was the nature of your conversation? State to the Court and jury what took place?

MR. GREENE: Objected to on the ground that was heretofore interposed to similar interrogatories to Mr. W. J. Bishop. He is offering testimony of negotiations leading up to a contract. It is a written con-

tract, and the law presumes that all negotiations and conversations leading up to that contract are bound, embodied and merged therein, and no evidence is admissible of matters preceding the contract.

The court overruled said objection, to which ruling plaintiff excepted, and the exception was allowed.

A. I went in there with the intention of selling them some spot hops—I think I did; and also asked them if they were interested in contracts, which they were, at the present time.

Continuing the witness said: By "they" I mean the Magnusses. At that moment they could not give me any definite answer. But I immediately wired my brother telling him that they were interested in some term contracts. I also talked to them about contracts which were to be written, off the yards that my brother runs.

(EXCEPTION NO. 22)

Q. And was there any conversation in regard to what these yards were, or your brother's connection with these yards?

To which plaintiff objected on the ground that said question was irrelevant and incompetent. The court overruled the objection and an exception was taken and allowed.

A. No, sir; only that they were my brother's yards. I didn't know which ones that he was going to sell them.

(EXCEPTION NO. 23)

Q. Was there any conversation in regard to the ownership of these yards?

To which plaintiff objected as irrelevant and incompetent. The court overruled the same and an exception was taken and allowed.

A. Yes, sir. I told them the yards were leased.

THE COURT: Did you tell them the terms?

A. Yes, sir.

(EXCEPTION NO. 24)

Q. (By Mr. Hampson): What were the terms as you told them?

Plaintiff objected on the ground that the terms were embodied in a written contract, and there is no mistake or fraud alleged concerning that contract. The conversation in all inadmissible and irrelevant.

The court overruled said objection and an exception to the ruling was taken and allowed.

A. I told them specifically that we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals.

(EXCEPTION NO. 25)

Q. For how much rent?

Objection by plaintiff on the ground that said question was irrelevant and incompetent and was overruled by the court, and an exception was taken and allowed.

A. One-quarter rental.

Witness continuing said: I was in conversation with the Magnusses about an hour and a half. They introduced me to Mr. Schumacher. He was in another little room. I shook hands with him through a hole in the window. Kind of a cage opening. As a result of

that conversation I communicated with my brother, W. J. Bishop.

(EXCEPTION NO. 26)

Q. And what was the nature of that communication?

Plaintiff objected on the ground that negotiations are merged in the contract which precludes inquiry into anything preceding it. The court overruled said objection and an exception to the ruling was noted and allowed.

A. I wired him I was leaving for home that evening, and that Magnusses were interested in term contracts and to take it up direct.

The witness continuing said: I then left Chicago and know nothing further of the transaction of my own knowledge.

ON CROSS-EXAMINATION the witness testified: I went by there to arrange contracts by which I mean to work up new business. I had power to make a contract, only it had to be confirmed by the Oregon office. Had no power until it was confirmed by my employer. Would not have made a definite contract with Magnus; would have wired my people first. If they had authorized me to make a contract, I would have let them take it up direct first, which is what in fact I did do. I did not undertake to make a contract with Magnus. I was just inquiring. We talked over prices. I offered them contract hops at 11½ cents. My brother then operated I think four yards under lease, two others besides the Hop Lee ranch. When I told Magnus I

would make a contract at 11½ cents he was very much interested and asked me to wire immediately and have him (my brother) offer the hops direct, which I did. Magnus would not take my offer of 11½ cents. The number of pounds and amount of hops was not mentioned, but the years 1917, 1918 and 1919 were mentioned. I did not mention 60,000 or 80,000 or 40,000 or any other number of pounds, I just asked him if he was interested in some term hops. That is all I said about that specific thing or these particular yards. I didn't mention any yards in particular. I mentioned the yards that Orey and Bishop were running, without specifying any number of pounds from any particular yards, either separately or in the aggregate. After we got finished talking I told him that the ones I represented leased the yards. He asked me how we leased the yards. I told him we paid crop rents. I think he asked me how much and I told him one-quarter. Nothing was said about getting the hops belonging to the owner of the land. I introduced myself as the representative of Bishop Bros. Said nothing about Adam Orey, although at that time Adam Orey had a lease on one of these yards. Don't know whether Bishop had an interest in the lease of the Hop Lee yards at that time. I didn't know what yards I was soliciting for, only the yards my brother was interested in. I sold him some hops besides the contract hops. Did not sell all of the spot hops in New York before I got back to Chicago.

HOP LEE called as a witness for defendants, being first duly sworn, testified as follows:

I live in Oregon several years: go away; come back;

about 30 years last time. I live in Salem 29 or 30 years. Own hop land in Marion County, own Chung yard and Stevens yard, one 14 or 15 years, other about ten years. They have been planted to hops since I owned them. I owned them between 1915 and 1919. Have rented them ever since I owned them on crop rent, one-quarter of crop in the bale, renter gets three-quarters. Get my quarter every time he bales he give me every fourth bale. We watch it; every fourth bale we take one bale. I know Mr. Bishop, he occupied the yard. I know Adam Orey. Orey and Bishop had a lease on Chung yard and Stevens yard. Lease on Stevens yard cover five years, 1917, 1918, 1919, 1920, 1921. Lease Chung yard five years, but run out in 1919. Both leases same kind, I got one-quarter of crop each year and sold to another man, not Bishop and Orey. Made contract with him before I rent to Bishop and Orey. Never sold hops to them. Always get one-quarter of the crop for rent.

ADAM OREY, called as a witness for defendants, being first duly sworn, testified as follows:

I am one of the defendants in this case, live in Salem, have been a farmer all my life, the last nine or ten years raising hops. Part of that time in partnership with W. J. Bishop in the Chung and Stevens hop yards. Have known those yards about seven years. Had a lease on the Chung yard beginning in 1915 running five years. The Chung and Stevens yards are two or three miles apart, but are operated in connection with each other. The lease on the Stevens yard was for five years, 1917, 1918, 1919, 1920 and 1921. I handled the farming end of my partnership with Mr. Bishop and lived on one of

the ranches superintending the production and cultivation of the hops. I had nothing to do with the selling of the hops. Never sold a pound of hops except hops that I actually grew myself. I did not know Magnus Brothers before this contract was entered into and know none of the details in connection with the contract. I am reasonably familiar with the capacity of the Chung and Stevens yard for producing hops, have known it for the last seven years. Their capacity is 1200 to 1500 pounds to the acre in normal conditions, or about 70,000 or 80,000 pounds for the two yards. In 1915 they produced a little over 60,000 pounds, somewhere between 60,000 and 70,000 pounds. In 1916 we didn't pick quite all of them, we got better than 60,000 that year. In 1915 and 1916 we didn't have the Stevens yard. The Chung yard produced about 60,000 pounds in 1915 and about the same in 1916. In 1917 it was about 50,000 pounds on both yards. That was a bad hop year, bad for help and bad on account of weather. In 1918 we didn't pick all of them, picked about 40,000 pounds and left about the same amount unpicked, the effect of which was a damage to the yard. The production has not been normal for the last year or two.

CROSS-EXAMINATION

In one sense of the word normal means whenever the crop is a good crop it is a normal year, and whenever it is a poor crop it is an abnormal year. A normal year the crop is 1200 to 1500 pounds per acre, which means a good average crop; whenever it falls under that it is not a normal year, it is getting off. For the last four

years it hasn't been normal, it has been under that. A normal average year is just what the average—what a man would get under average conditions, and it comes about once in five or six years, that is the way it has been with us, and that has been the fact, I believe, with other hop growers in Oregon. Since this contract was made, and for two years before that, we have never produced a normal quantity of hops on those yards. The average for the last five years on the two yards has been in the neighborhood of 40,000 to 60,000 pounds a year.

RE-DIRECT EXAMINATION

I refer to the hops that were picked. In 1918 we picked about 40,000, and we left approximately about the same amount, so that if the total crop had been picked in 1918 the production of the yards would have been in the neighborhood of 80,000 pounds. The non-picking of that had a very damaging effect on the future of the yard.

RE-CROSS EXAMINATION

In 1917 the total production was about 50,000 pounds, which was not the result of non-picking the previous year. When I say that 40,000 pounds were left unpicked in 1918 it is simply a guess. We have 45 acres in hops; we don't know how many pounds there are until we pick them and weigh them. In picking a yard of that kind we do not necessarily pick the best looking parts first. In lots of cases you have thin ground, sandy ground, your hops would get overripe, you pick them first. If you have heavy ground, you are afraid of mold,

you take those first. If we leave the field half unpicked we simply guess that the unpicked portions would, if picked, have weighed about as much as the part we did pick.

R. H. WOOD, called as a witness for defendants, being first duly sworn, testified as follows:

I live at Dayton, Oregon. Am a hop grower. Have been in that business three years, but familiar with it for 18 years as a buyer and seller, and as agent of non-residents who buy hops. That has been my exclusive occupation for that time. Am familiar with the custom, usages and technical terms of the business. I know the term "grower's contract," as used in the hop business. It has a technical meaning. It has a recognized meaning given to it generally by people in the hop business. I know that meaning. A grower's contract specifies a certain piece of ground for these hops to be grown on, and if the grower does not produce the estimated amount, for instance, like this contract for 60,000 pounds, I understand he only delivers what he does raise, or his portion.

(EXCEPTION NO. 27)

Q. Is there a distinction in the hop business between a grower's contract, so-called, and what is known as a dealer's contract?

Plaintiff objected to this question as irrelevant and immaterial, there being no issue as to a dealer's contract in this case. The court overruled the objection and an exception to the ruling was duly taken and allowed.

A. Yes, there is.

(EXCEPTION NO. 28)

Q. What is the fundamental difference between the two contracts?

Plaintiff objected to the question on the same grounds urged in Exception No. 27. The court overruled the objection and an exception to the ruling was duly reserved and allowed.

A. A dealer's contract specifies a certain amount of pounds to be delivered and quality likewise, off any yard, irrespective of where the hops come from.

MR. HAMPSON: I wish to ask this witness, your Honor, the same question that I asked the witness Bishop, with regard to custom and usage, assuming, of course, that your Honor will rule as he did rule, and wish to make the same offer of proof as was given in connection with the testimony.

THE COURT: Very well. Ask the question.

MR. GREENE. You don't want to repeat the question?

MR. HAMPSON: I don't need to repeat the question, if the record may show that question was asked, the objection interposed, ruling made, and offer of proof made, exactly the same as was done with the witness W. J. Bishop.

COURT: Very well.

Objection. Exception allowed.

H. W. RAY, called as a witness for the defendants, being first duly sworn, testified as follows:

I have been in the hop business 20 years and am familiar with the customs and usages of the business, and

its technical terms. The term, "grower's contract," has a meaning or significance generally known to, and given to it by, men in the hop business. It is a contract that covers a specific piece of ground. It also carries a chattel mortgage on that particular crop of hops to protect the advances made on the contract, and the grower is not liable for more than he produces on that particular piece of ground, nor for the delivery of quality that might be specified in the contract if he didn't produce that.

HUGH NELSON, called as a witness for defendants, being first duly sworn, testified as follows:

I have been in the hop business for 20 years, and am familiar with its customs, usages and technical terms. Am familiar with the term, "grower's contract." It has a technical significance among hop men. It is an instrument in writing, entered into between a grower and a dealer, whereby the grower sells a certain amount of hops off a described piece of property, at a certain price, for a certain year; and he is not liable for any more hops than is raised on that piece of ground that year.

The defendants then rested their case.

W. J. BISHOP, by permission of the court, was then recalled for further cross-examination and testified as follows:

Of the 40,000 pounds of the crop of 1918 which we harvested, leaving about 40,000 pounds unpicked, we delivered three-quarters, or 30,000 pounds of the 40,000 pounds picked to Magnus and delivered 10,000 to Hop Lee as rental. Magnus had advanced the full percentages on the whole 60,000 pounds, 3 cents per pound for cultivation money and 5 cents a pound for picking

money. The money was advanced before we knew that we were going to leave the hops on the yard.

(EXCEPTION NO. 29)

Plaintiff then asked the witness what was the market price of hops that year, and an objection by defendants to the question was sustained by the court.

Plaintiff then offered to prove by the witness that the market price of hops in 1918, the only year under the contract when the yards produced as much as 80,000 pounds of hops, was as low or lower than the contract price, and during all the other years under the contracts, when the production was under 60,000 pounds, the market price of hops was very much higher than the contract price.

The court sustained an objection to said offer of proof and an exception to the ruling was duly reserved and allowed.

G. G. SCHUMACHER was thereupon called as a witness for plaintiff in rebuttal and testified as follows:

As fast as we make these contracts with growers we make sales to brewers and others at the market price on the day of sale, relying upon the growers' contracts with us to fulfill our contracts with the brewers. In case growers default with us we have to go in the open market and cover ourselves. The 60,000 pounds of hops in the defendants' contract for the year 1919 were resold by us on dealer's contracts with the brewers at 15 cents per pound.

CROSS-EXAMINATION

We sold these hops to several brewers in Chicago; Keeley Brewing Co., Chicago, was one. We sold them 20,000 shortly after we made this contract. I think it was a term contract we sold them. We handle 3000 or 4000 bales of 200 pounds to the bale in a year, about 800,000 pounds in a year. We bought these hops in 1917, five years ago. Have handled four million pounds of hops since then. To the best of my recollection I undertake to say that we sold 20,000 pounds of those hops in 1917 to the Keeley Brewing Co. for 15 cents a pound. We sold the remaining 40,000 pounds of this contract at about the same price, but I don't remember to whom. I can recall the price we received, although I don't remember the purchaser, because I know pretty near the margin of profit that we aim to make on our sales. In a general way when we buy hops we sell against the hops we had bought and my testimony is in view of that fact. These particular hops were not mentioned in the Keeley Brewing Co. contract; they didn't know they were getting hops off the Orey and Bishop yard nor from where they were getting them. We sold 20,000 pounds of hops to the Keeley Brewing Co., any hops, we agreed to deliver at a certain date hops of a certain quality, at a certain price. In other words, we made a dealer's contract with them and didn't identify the Orey and Bishop hops in any respect. We sold 20,000 pounds of some hops.

RE-DIRECT EXAMINATION

We base our sales to brewers on market price on day

of sale and sell hops that we contract for or purchase. When we make a purchase or a contract we immediately endeavor to make sales against such purchases or contracts, at the market price on that day.

RE-CROSS EXAMINATION

When we enter into contracts of this kind we guard ourselves against a shortage of production. In contracts such as this one, for a maximum of 60,000 pounds we don't sell against them up to the full amount, we make allowance for the shortage that frequently exists. We instruct our buyers to be careful and not contract for the entire crop and protect ourselves in that way. When we entered into this contract we did not sell the full 60,000 pounds. I only remember the sale of 20,000 pounds and it is possible that is the only amount we sold against this contract.

RE-DIRECT EXAMINATION

We usually hold back one-third on these contracts for protection in making dealer's sales to brewers. If the grower's contract with us is for 60,000 pounds we endeavor to resell two-thirds of that or 40,000 pounds to the brewer, having first instructed our buyers not to buy up to the full capacity of the yard, in making the contract with the grower.

RE-CROSS EXAMINATION

Under our method of doing business and to guard against overselling, we would not in any event have sold

more than 40,000 pounds against this contract. We made other sales besides the 20,000 pounds, but I don't recollect them. To the best of my recollection in 1917 we sold against this 1919 crop. The matter has been pretty fresh in my memory the past three years on account of this litigation and dispute. The dispute started in November, 1919, the litigation in March, 1920.

Thereupon the plaintiff offered the deposition of AUGUST MAGNUS, a witness on behalf of the plaintiff, who testified as follows:

I reside at 650 Sheridan Road, Winnetka, Illinois. Am president of A. Magnus Sons Company, dealers in hops, brewers' machinery and supplies. The business was established in 1867. I know W. J. Bishop. Plaintiff had dealings with defendants in 1917, 1918 and the last in 1919. We entered into a written contract with them for the purchase of 60,000 pounds of hops at 11½ cents a pound. In 1919 the contract price, by mutual consent, was increased to 16 cents a pound. They offered us by telegraph a three year contract for 60,000 pounds of hops to be delivered each year at 11½ cents a pound, subject to general grower's contract. We telegraphed an acceptance of the contract and asked them to forward the agreements, which they did. The contract was signed by the defendants prior to its receipt by us. We signed the contracts in duplicate and returned them to defendants for record. Mr. Bishop's brother, A. C. Bishop, was here once or twice prior to 1919, who represented the defendants. We had a conversation with him on the subject of hops generally, but not in reference

to the subject matter of the contract. Nothing was ever said by the defendants or by any representative of the defendants, prior to the execution of the contracts, with reference to the plaintiff receiving anything else than the entire output of hops upon the land specified in the contract up to 60,000 pounds, or anything which would lead the plaintiff to believe that they were to receive anything less than the entire output from the parcel of land specified, up to 60,0000 pounds. At the time of the execution of the contract we believed we had contracted for 60,000 pounds of hops, and neither the defendants nor their agent intimated anything to the contrary. The contract as executed contains all of the terms and conditions as understood by plaintiff and defendants prior to or at the time of its execution, excepting the bonus that we subsequently added of 4½ cents a pound in price, which was not in writing. Referring to the next to the last paragraph in the contract, where the seller mortgages the entire crop of hops to the purchaser, nothing was said at any time by any of the defendants or by anybody representing the defendants that the mortgage was to cover only the share of defendants in the crops raised upon the land described in the contract.

QUESTION: At the time that this contract, which has been received in evidence, was executed, did you have any knowledge as to whether the defendants owned this land, or whether the land specified in the contract was leased land?

ANSWER: It was leased land.

Q. Do you know anything about the terms and conditions of that lease?

A. No.

Q. Did you have any knowledge that the lease provided that the defendants were to have as their share three-quarters of the output of hops, and that the landlord was to have one-quarter as his rental?

A. No.

Q. Did you have any information at that time as to the kind of lease it was?

A. No.

Q. That is, with reference to whether it was a crop lease or a cash lease?

A. No.

Q. Was anything ever said by any of the defendants with reference to their contracting to sell only their share of the hops under the 1919 contract?

A. No.

Q. At the time that the contract was executed or prior thereto, was anything said by defendants about three-quarters of the crop or that 60,000 pounds as specified in the contract meant that amount out of the defendants' share of the crop?

A. No.

Q. As a matter of fact, Mr. Magnus, what did the plaintiff believe at all times that they were contracting for, with reference to the hops, the subject matter of this contract?

A. We expected sixty thousand pounds, as per contract.

Continuing, the witness testified: I believe all the hops raised on the land described in the 1917 and 1918 contracts were delivered to plaintiff. Defendants have not at any time intimated otherwise, and if it should develop that all the hops under the contracts of 1917 and 1918 had not been delivered, plaintiff would bring suit for recovery. Plaintiff has performed all the terms of the 1919 contract, made the advances to defendants as therein required, and has demanded delivery of the difference between the amount actually raised on the land and the amount delivered under the 1919 contract. Defendants have refused to deliver such difference.

CROSS-EXAMINATION

I have been in Oregon, but I have not seen these lands. I did not personally see the defendants in connection with the 1917, 1918 and 1919 contracts when I was in Oregon. Do not know what the Hop Lee ranch in South Prairie was other than as described by Bishop and Orey when they submitted the contract. Have frequently made contracts for hops for the amount of hops in pounds that the seller was to receive from his lands, but such contracts were not made with the knowledge that the seller was entitled to only a portion of the crops raised on his lands. I never to my recollection made any contracts with any seller for only the portion he was to receive from the land. We have made contracts with growers who have rented for a portion of the crops raised on the farm, and in those cases we protected ourselves, as we sold the hops at the time we purchased

them, or as soon thereafter as we could, and tried to keep the amount in line so that it would not jeopardize our interests. It did not happen often, and it is not quite common that the seller receives three-quarters of the crop and the landlord one-quarter. Bishop was a hop dealer. He offered us 60,000 pounds of hops on contract; whatever he raised over that he could do as he liked with.

QUESTION: His land was leased?

ANSWER: So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of the lease.

Q. He was to deliver 60,000 pounds of hops irrespective of what the terms of his lease might provide?

A. Irrespective of what the terms of his lease were.

Q. So that your contract with him did not contemplate that he was to give you all his hops, or all the crop of hops, that was raised on his land?

A. It was contemplated that we were to receive up to 60,000 pounds of what he raised.

Continuing, the witness testified: Under the contract of January, 1917, we received 36,277 pounds. In 1918 we received 28,805 pounds and paid 3½ cents per pound for the difference between the thirty-one thousand and approximately two hundred pounds, to make complete the 60,000 pounds. By the difference, I mean in 1918 they only picked 28,805 pounds. In 1918 prohibition came; 28,805 pounds is what we got. We paid 3½ cents a pound for the balance of the 60,000 pounds not picked; they were left on the vines, which was agreeable to defendants. That is, they did not pick the full

crop. In other words, they released us from the contract and we paid them 3½ cents a pound for the difference between what they had picked and 60,000 pounds.

RE-DIRECT EXAMINATION

We have made contracts with growers, but such contracts are not usual. We usually contracted for less than they raised, in order to protect our sales. In such a contract as that there was not a question of the landlord being interested at all. We rarely made contracts —I do not recall making any contracts with landlords, without responsibility.

THEREUPON, on January 12, 1922, both sides rested, and the following proceedings were then had, to-wit:

THE COURT: The court will now decide this matter that has been argued, touching the interpretation of this contract.

We will first review the contract, in order to get at its terms to the extent necessary for the decision of this case.

This is a contract that was entered into between Adam Orey and W. J. Bishop and A. Magnus Sons Company; Orey and Bishop being designated in the contract as the sellers and A. Magnus & Sons Company as the buyer. The contract provides that the sellers, for and in consideration of a nominal sum, agree to sell and deliver to the buyer 60,000 pounds of hops of the crop to be raised and grown by the sellers on certain premises. Those premises are known as the Stephens

yard and the Chung yard. It is further stipulated that the hops are to be prime in quality. The amount advanced on these hops was $1800. That was agreed to by the terms of the contract. It was the equivalent of 3 cents per pound on 60,000 pounds. Then it was further stipulated that, for picking purposes, the buyer should advance the further sum of 5 cents per pound; and then, upon acceptance of the hops, if up to the quality stipulated in the contract, there should be paid by the buyer to the sellers the further sum of 3½ cents per pound, which would make the entire amount agreed to be paid for the hops, namely, 11½ cents per pound. There is a stipulation in the contract as follows:

> "For the purpose of obtaining the money provided for in this contract, the seller represents to the buyers, that they lease the above described property, which is free from all encumbrances."

Then it is further stipulated that, in case of loss of the hops by fire or wind or otherwise, the sellers will repay to the buyer the amount of money that has been advanced upon the crop. It is further agreed that:

> "If the seller should sell said hops, or any part thereof, in violation of the terms of this agreement to any other person or persons or refuse to deliver the same to the buyers, as herein agreed, or otherwise fail to perform the terms and conditions of this contract, to be kept and performed by him, the buyers not being in default, in the terms and conditions to be by them kept and performed, the buyers shall be entitled to receive, in addition to all advances made and interest thereon, as herein speci-

fied and agreed, as liquidated and ascertained damages for such breach on the part of the seller the difference in value between the contract price of said hops, as herein specified, and the market value thereof of the kind and quality in this contract mentioned."

That stipulation is for the purpose of fixing liquidated damages in the case, and those damages were to be the difference between the contract price of the hops and the price of the hops at the date of delivery, namely, on the 31st day of October, 1919. Then there is another stipulation, in this language:

"And inasmuch as the buyers have agreed to make certain advances under the terms of this contract, relying upon the promises of the seller herein contained, the seller for the faithful performance of this contract and as security for the advances which the buyers may make and for such damages as they, the buyers, may sustain by reason of the default of the seller, does hereby bargain, sell, pledge and mortgage to the buyer the entire crop of hops to be raised upon the premises above described in the year 1919, and does authorize and empower the buyers, upon such default or breach of the seller to foreclose this agreement as a mortgage, and it shall be lawful for such person, his agents or assigns to take immediate possession of said property and to sell the same at public auction, after giving notice of the same as is given by the sheriff on the sale of personal property on execution."

Then there is other language, which looks to the completion of the sale, and the application of the proceeds of the sale to the payment of the advances and t damages.

The contract closes with this clause:

> "It is further agreed that the seller shall not be responsible for any default in the provisions of this contract, excepting to repay advances and interests thereon, by reason of shortage of the crop of hops raised upon said premises, if such shortage be occasioned by unfavorable season and could not be for that reason prevented by him."

Now, I have recited all of the terms of the contract which I deem to be essential for the decision of the question before me.

The testimony which has been offered in this case, in order to show the conditions then prevailing and the situation of the parties, may be epitomized as follows:

A. C. Bishop, who is a brother of the Bishop who entered into the contract, went to Chicago immediately prior to the time that this contract was entered into, and he testifies that he had a conversation with one of the Magnuses, and that he then and there disclosed to Magnus the fact that the Bishop Brothers—they were talking then under the name of Bishop Brothers—desired to sell hops, to be grown under a grower's contract, and he relates that at that time he disclosed to Magnus the fact, not only that the hops were to be raised under a grower's contract, but the conditions of the lease, namely, that the growers were to enter into a lease for these lands, and that the conditions of the lease were

that the growers should pay the lessor a one-fourth interest in the crop; that is to say, it was to be a cropping contract, on shares, by which the growers would pay to the lessor one-fourth of the hops grown.

Now, it is argued that, as Magnus has testified that he knew nothing of these conditions, the court would not be warranted in giving Bishop's testimony full credence. However, from all the circumstances of the case, I am led to believe that Bishop was telling the truth about it. Magnus himself has contradicted himself in the testimony which he has given here. I mention one particular only. He testified in his examination in chief that he knew that the crop was to be produced from leased land; but on cross-examination, he testified as follows:

> "Q His land was leased? A. So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of lease."

So that there is a very plain contradiction in his own testimony; and, from the surrounding circumstances, as to what happened, and as to the manner in which the contract was finally executed, or as to the things which led up to the execution of the contract, I am inclined to believe Bishop's testimony. I therefore take it that Mr. Magnus, representing A. Magnus Sons Company, knew at the time this contract was entered into that the defendants in this case were producing these hops from leased lands, and that he also knew the terms upon which the lands were leased; that he knew it was a cropping lease, and that the lessor was to receive a one-fourth interest in the crop.

Now, then, Bishop testifies that he telegraphed his

information to Bishop Bros. That information was acted upon by Bishop Bros., and the testimony of W. J. Bishop is to the effect that, before making the contract, he entered into the contract of leasing with Hop Lee, in order that he might be such an owner as would warrant him in making a contract for the sale of the hops. Upon receiving that information and obtaining the lease for the premises upon which the hops were to be grown. Bishop Bros. telegraphed to A. Magnus Sons Company as follows:

> "We offer you sixty thousand pounds three years at eleven half fob our own leased yard written on regular growers contract mentioning primes. Yard we wish to sell heavy producer, always spray and usually produces prime to choice quality. Was contracted Hugo Lewi last year, Rosenwald year before. Wire direct."

Now, that contains the information that the lands were leased; and that is prior to the execution of the contract. A. Magnus Sons Company thereupon wired to Bishop Brothers:

> "We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample."

The contract was prepared by Bishop in the language in which we find it now, and was signed by Orey and Bishop and sent on to A. Magnus Sons Company, and

A. Magnus Sons Company accepted the contract, and signed it, and sent the original back for recording, and it was so recorded.

Now, the defendants, after the crops were grown and matured, acted upon the theory that the sale was for their interest in the crop only, because the division was made that way. Three-quarters of the crop were delivered to A. Magnus Sons Company, and the other one-quarter of the crop was delivered to the lessor, Hop Lee.

It was testified also that the capacity of these yards, in normal times, was the production of 80,000 pounds of hops.

So that here you have all the testimony, I think, that would have a bearing on the controversy for the correct interpretation of this contract.

It has been stipulated here that the total amount, or the net amount which was delivered to A. Magnus Sons Company, was 28,822 pounds, that being three-fourths of the crop; and the amount delivered to Hop Lee was 9,607 pounds, that being one-fourth of the entire amount. About that there is no dispute.

Now, we come to the question of the interpretation of this contract in the light of the testimony which I have recounted.

I will say, as a premise, that the decision of Judge Bean, which was rendered upon motion to strike the complaint, was upon the face of the contract as it was then produced, and his attention was not called to the facts and circumstances and conditons prevailing at the time the contract was entered into. Construing the con-

tract as it appeared to him upon the face of it, he said that it was plain in its terms, and that the construction would follow from the language; but, as I have remarked, he was not in possession of the facts and circumstances and conditions prevailing at the time the contract was entered into. I have those facts and circumstances before me, and in that respect the conditions are different. I am passing upon a different situation from that which he passed upon at that time, and hence I say that his decision does not become the law of the case, in so far as I have to deal with it now.

We might premise, further, that it is a presumption of law that, where a contract is written and has been signed by the parties, that written instrument contains all the terms and conditions of the contract entered into between the parties.

Another rule of law is that the plain language of the contract, where it is unambiguous, is to govern, and the court will construe it by its four corners, and determine what its meaning is.

It will be noted that, by the terms of this contract, the sellers agreed to sell 60,000 pounds of hops of the crop to be raised and grown by the sellers. That does not say the whole crop. It says 60,000 pounds of the hops to be raised. The last clause of this contract provides, as I have indicated before, that in case there is a shortage of the crop by reason of unfavorable season, the sellers shall not be responsible for such shortage, and will not be responsible in any way except to repay the money advanced on the contract.

Now, this indicates that there was not an absolute

sale of 60,000 pounds of hops. There was a sale of 60,000 pounds of hops providing they were grown. That brings up the crucial question here. These yards were capable of producing 80,000 pounds of hops, and if they had produced 80,000 pounds, the defendants in this case could have fulfilled this entire contract by delivery of 60,000 pounds of hops out of their three-fourths interest in the crop.

Now, to allude to that stipluation again that it shall be 60,000 pounds of hops of the crops to be raised and grown by the sellers: It was well known to the plaintiff in this case, as well as the defendants, that defendants were lessees of the lands upon which this crop was to be grown; and it is presumed that the buyer knew that a leasing of land for the production of hops on the shares would result in the lessees having a three-fourths interest in the crop and the lessor a one-fourth interest. When we take that into account, all the parties being advised of the situation under which this lease was made, then it would be perfectly reasonable and natural to read this contract as that the sellers have sold 60,000 pounds of the crop to be raised and grown by them; that is to say, of their share in the crop to be produced; and I think that is a reasonable construction of the contract.

Now, there are other things to be taken into consideration, along with this, in construing the whole contract. I have read the stipulation as to the execution of the mortgage, and that is for the protection of the buyer, to secure the repayment to the mortgagee of all of the advances on this crop, and any damage that might be

sustained under the terms of the contract. While the language is to the effect that the sellers sell and mortgage the entire crop of hops to be raised upon the premises, that must be read in connection with the other clauses of the contract, and especially with the one that I have been construing. The mortgage provides that the mortgagee may take, in the foreclosure of the mortgage, this property into possession, and sell the same. It is a legal fact that it could not do this as to any portion except the portion that belonged to the defendants, because the lessor had an interest in the crop that could not be taken away from him in that way and sold. So that, taking in consideration the facts and conditions which the parties then knew themselves, and were in the possession of, they were aware that they could not take the lessor's interest into their possession and sell it. As to this, for the purpose of elucidating further, in construing the contract as a whole, the sellers sold, of the hops grown or to be grown by them, 60,000 pounds of the crop, or of their share in the crop to be raised. I think that is the legal and natural construction and interpretation of that contract, and I will so hold.

Under that interpretation, it would seem that the defendants are entitled to prevail in this case.

Do you make a motion for a judgment?

MR. HAMPSON: We did make a motion, your Honor, which I now renew under your Honor's ruling, for a directed verdict in favor of the defendants.

COURT: Is that in writing?

MR. HAMPSON: I have prepared a form of verdict.

MR. GREENE: I have also an instruction, in order to preserve my record on appeal, I would like to offer, and ask the court to give.

COURT: This is the form of verdict, but what I am getting at, Mr. Hampson, is, do you move for an instructed verdict?

MR. HAMPSON: We do move for an instructed verdict.

COURT: You better reduce that to writing.

MR. HAMPSON: Yes, your honor.

(EXCEPTION NO. 30)

MR. GREENE: I have mine here:

REQUESTED INSTRUCTION

The contract sued upon required the delivery by defendants to plaintiff of the crop of hops raised and grown by defendants upon the lands therein described in the year 1919. It is admitted that the defendants raised and grew 38,429 pounds of prime hops on said lands in 1919, that 28,822 pounds thereof have been delivered according to contract and that defendants have failed and refused to deliver 9,607 pounds thereof. It is undisputed that the market price of hops of said quality at Salem, Oregon, on October 31, 1919, was 85 cents per pound. I instruct you to return a verdict for the plaintiff and against the defendants for $6,628.83, the same being the value of said 9,607 pounds of hops at 85 cents per pound, less the contract price of 16 cents per pound, or 69 cents per pound, together with interest on said sum

from October 31, 1919, at the rate of six per cent per annum.

MR. GREENE: I assume your honor will deny the instruction, on account of the ruling made.

COURT: Yes. Your instruction is denied.

MR. GREENE: We save an exception. I think I will also ask this instruction, if your Honor please, namely:

(EXCEPTION NO. 31)

The jury is instructed that, if they find from the evidence that the plaintiff knew before this contract was entered into that Bishop and Orey made or intended to make a contract of sale of hops to be raised and grown on a farm or lands rented by them on a crop rental, reserving one-fourth of the crop as rent, it will be their duty to return a verdict for the defendants; but if, on the other hand, the jury are satisfied from the evidence that A. Magnus Sons Company did not know that Bishop and Orey were contracting with reference to hops to be raised and produced on leased land, or if plaintiff did not know the terms and conditions of that lease, it would be the duty of the jury to return a verdict for the plaintiff.

That puts the question of judging on a question of fact to the jury. Your Honor assumed to decide whether Magnus or A. C. Bishop was telling the truth; whereas, that is entirely and exclusively the function of the jury, to pass on a question of fact as to the veracity of witnesses. I want to get that question in the record so that it will appear that I have applied to the court to submit

that question to the jury as a question of fact, and not as a question of law to be decided by the court.

COURT: I think that is a question for the court, because it is offered solely for the purpose of aiding the court in interpreting the contract. Therefore, I will overrule your motion in that respect, and you may have your exception.

MR. GREENE: I will take exceptions separately to each of the requests.

COURT: Very well. Now, gentlemen of the jury, it becomes my duty in this case to direct you to return a verdict in favor of the defendants. The verdict is, in form, as follows:

We, the jury, duly empaneled in the above entitled court and cause, under the direction of the court, return our verdict for the defendants and against the plaintiff.

(EXCEPTION NO. 32)

MR. GREENE: May I note an objection and exception to the ruling of the court directing a verdict, as just read?

COURT: Yes. you are entitled to that.

And thereafter on the 12th day of January, 1922, based upon said directed verdict a judgment was entered in said court and cause in favor of defendants and against plaintiff to the effect that plaintiff take nothing by its said action and that defendants recover their costs and disbursements taxed at $56.60.

And now that the foregoing matters and things may appear and remain of record in this cause, I, the undersigned, trial judge, sitting at the trial of this action, sign and seal the foregoing bill of exceptions reserved

by plaintiff; and I certify that the exceptions alleged by the foregoing bill to have been taken and allowed were duly taken and allowed as therein set forth after the jury had been empaneled and while it was still at the bar; that the foregoing bill of exceptions contains all of the evidence and proceedings had in the trial of said action; that the opinion and instruction of the court is fully set out therein, and no other or further instructions were given than as noted in said bill; that this bill was served, tendered and filed within the time allowed by law and the orders of this court therefor, and the same is hereby accordingly settled, allowed and approved this 22d day of May, 1922.

CHAS. E. WOLVERTON,
District Judge.

And thereafter on the 7th day of July, 1922, there was served and filed in said court and cause the following

PETITION FOR WRIT OF ERROR

Now comes A. Magnus Sons Company, a corporation, plaintiff herein, and says that on or about the 12th day of January, 1922, this court directed a verdict against your petitioner and in favor of defendants, and upon said verdict rendered and entered a final judgment in favor of defendants and against this plaintiff, whereby it was adjudged that plaintiff take nothing by this action and that defendants recover their costs and disbursements herein taxed at $56.60; that in said judgment and proceedings had prior thereunto certain errors were committed to the prejudice of this plaintiff, all of which will appear more in detail from the Assignment

of Errors which is filed with this petition;

Wherefore, feeling itself aggrieved thereby plaintiff prays that a Writ of Error may issue in its behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit; that plaintiff may be permitted to prosecute the same to said court for the correction of errors so complained of and herewith assigned; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said court, and that an order be made allowing said Writ of Error and fixing the amount of the supersedeas bond which the plaintiff shall give, and that upon the giving of said bond all further proceedings in this court be suspended until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

BAUER, GREENE & McCURTAIN,
Attorneys for Petitioner in Error.

Service of the within petition by receipt of a copy thereof duly certified is hereby accepted at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

And on the same day, and accompanying said Petition for a Writ of Error, there was filed the following

ASSIGNMENT OF ERRORS

Now comes plaintiff, A. Magnus Sons Company, a corporation, plaintiff in error in the above entitled cause, and in connection with its petition for a writ of error

therein assigns the following errors which it avers occurred on the trial thereof; and upon which it relies to reverse the judgment entered herein:

1.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. What aspects of the hop business were covered in your conversation with them?"

And in this regard plaintiff states that this action was brought for damages resulting from the breach by defendants of an express written contract, definite, certain and unambiguous in its terms, for the sale and delivery by defendants to plaintiff of the crop of hops to be grown in 1919 on certain lands therein described. Said contract was prepared and written by defendants and its execution as alleged in the complaint was admitted. Said witness W. J. Bishop is one of the defendants called on his own behalf to testify to the knowledge existing on the part of plaintiff's officers with respect to the customs and usages of the hop business in Oregon and had testified that he had conversed with Albert Magnus and August Magnus at different times prior to 1917 relative to the hop industry. To the question above quoted the witness was permitted to testify and did testify: "Well, we went over all the aspects of the business—contracts, and buying hops, and growers' contracts, and dealers' contracts. We talked over the business generally." (Bill of Exceptions, pp. 8-13; p. 42 *supra.*)

2.

The court erred in overruling plaintiff's objection to

the following question propounded to said witness W. J. Bishop:

"Q. Do you know who had the lease of those lands in 1916?"

In regard to which plaintiff states that said witness is one of the defendants and was called on his own behalf to testify that himself and partner Adam Orey leased the lands described in the contract of sale of the hops grown thereon which were sold to plaintiff, said contract being the contract sued upon herein and in which defendants covenant that they are lessees of the lands; and by this question witness was permitted to testify and did testify that Adam Orey and W. J. Bishop had the lease of said lands. (Bill of Exceptions, pp. 13-14; p. 48 *supra.*)

3.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. Were the leases written leases or oral leases?"

And in this regard plaintiff states that said witness is one of the defendants and was called on his own behalf to testify concerning the leasing by defendants of the lands described in the contract sued upon; that in said contract defendants covenant they are lessees of the lands, and by this question the witness was permitted to testify and did testify: "The Chung yard was a written lease and the Stevens yard was an oral lease. I have been unable to find the written lease on the Chung yard although I have made an attempt to do so." (Bill of Exceptions, p. 14; p. 49 *supra.*)

4.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. What were the terms of that lease with respect to the rent to be paid to the owner, Hop Lee?"

In respect to which plaintiff says that said witness is one of the defendants and was called on his own behalf to prove that defendants leased the lands described in the contract in suit on a crop rental basis, and witness was permitted to testify and did testify: "Yes, Hop Lee was to get one-fourth of the hop crop, and we were to get three-fourths of the crop each year." (Bill of Exceptions, pp. 14, 15; p. 49 *supra.*)

5.

The court erred in overruling plaintiff's objection to the question propounded to said witness W. J. Bishop, namely:

"Q. And what did the lease provide in a general way about the use to which the land was to be devoted?"

And plaintiff states that witness, who is one of the defendants in his own behalf, was permitted to testify and did thereupon testify: "Devoted to raising hops." (Bill of Exceptions, p. 15; p. 50 *supra.*)

6.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. Now, state what the terms of the oral lease on

the Stevens yard were?"

And in this regard plaintiff states that said witness is one of the defendants called in his own behalf to testify that defendants were obligated to pay the owner of the lands described in the contract sued upon a part of the hop crop grown by defendants thereon as rental; and said witness was permitted to testify and did testify, in answer to said question: "Hop Lee was to get one-fourth for rent of the place, and we were to get three-fourths" (Bill of Exceptions, p. 16; p. 51 *supra.*)

7.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. And in a general way, did that lease provide for the use of the land for the purpose of cultivating and raising hops?"

And said witness, who is one of the defendants, was permitted to testify and did testify: "Yes" (Bill of Exceptions, p. 16; p. 51 *supra.*)

8.

The court erred in overruling plaintiff's objection to the introduction in evidence, as Exhibit 1, of the written lease dated January 24, 1917, executed by Hop Lee as lessor and Adam Orey and W. J. Bishop as lessees whereby the former demised to the defendants for the term of five years from January 24, 1917, thirty-one acres situated eight miles North of Salem, Oregon, (being a part of the lands described in the contract sued upon) at a rental of one-fourth of all hops produced

from said premises each year, same to be baled by lessors and delivered at boat landing.

And in this regard plaintiff states that in and by the contract sued upon in this action defendants sold the entire crop of hops to be grown by them in 1919 on the lands described therein, of which the lands mentioned in said lease are a part, and covenanted with plaintiff in said contract that they lease the therein described property, free from all encumbrances and that they had made no other contract for the sale of any part of said crop of hops; that defendants prepared and wrote said contract for the sale of said crop of hops to plaintiff and by their answers to the complaint herein admitted its execution and terms; that said witness W. J. Bishop, who is one of the defendants called on his own behalf to produce said lease for the purpose of showing that defendants leased the lands described in the contract in suit on a crop-rental basis and that one-fourth of the crop when harvested belonged to the lessor of the lands (Bill of Exceptions, pp. 17-20; p. 52 *supra.*)

9.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. State whether or not, Mr. Bishop, during the years 1917, 1918 and 1919, covered by this written lease, and during the same years covered by the written lease on the Chung yard, Orey and Bishop did or did not deliver to Hop Lee one-fourth of the hops grown on those yards?"

And in this regard plaintiff states that said witness is one of the defendants and was called on his own behalf to testify that defendants leased the lands described in the contract sued upon on a crop rental basis, one-fourth of the crop when harvested going to the landlord, and that such portion of the crop had been delivered to the landlord for the years mentioned; and to said question the witness was permitted to answer and did answer: "We delivered one-fourth of the hops to Hop Lee during each of the years 1917, 1918 and 1919" (Bill of Exceptions, pp. 20-21; p. 56 *supra.*)

10.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. Mr. Bishop, after the negotiation and execution of that lease, what did you next do with respect to entering into the contract on which this lawsuit is now being brought?"

And in this regard plaintiff says that said Bishop is one of the defendants called as a witness on his own behalf and in answer to said question was permitted to testify and did testify as follows: "I went back to McMinnville and by telegram offered the hops to Magnus, that is, our hops we had grown. I wired Magnus January 24, 1917, when I got back from Salem, after writing up the lease with Hop Lee" (Bill of Exceptions, p. 21; p. 56 *supra.*)

11.

The court erred in overruling plaintiff's objection

to the admission of the telegram sent by the witness W. J. Bishop to plaintiffs, same being marked Exhibit 2, as follows:

"McMinnville Org 23

Stamped
1917 Jan 24 AM 1 15

A. Magnus and Sons
Randolph Chicago Ill
We offer you sixty thousand pounds three years at eleven half FOB our own leased yard written on regular growers contract mentioning primes yard we wish to sell heavy producer always spray and usually produces prime to choice quality was contracted Hugo Lewi last year Rosenwald year before Wire direct

Bishop Bros."

And in this regard plaintiff says that said witness is one of the defendants and was called on their behalf; that the said telegraphic offer and acceptance thereof led to the execution of the contract sued upon in this clause which was prepared and written by said W. J. Bishop and is definite, certain and free from ambiguities, and that said contract is admitted by the defendants in their answers filed to the complaint herein (Bill of Exceptions. pp. 21-22; p. 57 *supra.*)

12.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop, who was called to testify on his own behalf, viz:

"Q. State what the capacity of the Hop Lee ranch was."

And thereabouts plaintiff states that by the contract sued upon defendants, in definite, certain and unambiguous terms, sold and agreed to deliver the crop raised on said Hop Lee ranch in 1919 up to 60,000 pounds, or the entire crop in case the same should be less than 60,000 pounds, and it had been stipulated and admitted that the entire crop on said lands in 1919 was 38,429 pounds, of which 28,882 pounds net had been delivered to plaintiff and that 9,607 pounds of said crop had not been delivered. And said witness was permitted to testify and in substance did testify in answer to said question that there was something over 60,000 pounds on the Chung yard the year before; that he did not know the exact production of the Stevens yard, but it was always known as a heavy yard; that the crop had never been picked in its entirety until defendants ran it, and that the capacity of the two yards together under normal conditions is from eighty thousand to one hundred thousand pounds (Bill of Exceptions, p. 23; p. 58 *supra.*)

13.

The court erred in overruling plaintiff's objections to the following question propounded to said witness W. J. Bishop:

Q. In this telegram, the phrase, regular grower's contract' is used. Has that, or has it not, a technical meaning in the hop business?

With respect to which plaintiff says that a written contract, definite, certain and unambiguous in its terms,

had been made by plaintiffs and defendants, embodying all previous negotiations and communications, and said witness was permitted to answer and did answer said question as follows: "It has a technical meaning" (Bill of Exceptions, p. 23; p. 59 *supra.*)

14.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. Are there other contracts than regular growers contracts used in the hop business?"

Said witness is one of the defendants called on his own behalf and was permitted to testify and did testify in answer to said question: "Yes, sir" (Bill of Exceptions, pp. 23-24; p. 59 *supra.*)

15.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop, one of the defendants called on his own behalf:

"Q. And what is the term used to designate the latter class of contracts?" To which question the witness was permitted to answer and did answer: "Dealers contracts." (Bill of Exceptions, p. 24; p. 60 *supra.*)

16.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. What is the meaning in the hop business—and by the hop business, I mean among the buyers and sellers of and dealers generally in hops—of the term 'regular growers contract'?"

And in this regard plaintiff says that the contract sued upon was prepared and written by defendants and accepted and signed by plaintiff subsequent to the telegraphic and other negotiations between the parties; that the same is definite, certain and unambiguous, and said witness who is one of the defendants called on his own behalf was permitted to testify and did testify in answer to said question: "That means that the grower is selling hops off an identical piece of ground" (Bill of Exceptions, p. 24; p. 60 *supra.*)

17.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop, one of the defendants called on his own behalf:

"Q. And wherein is such a contract different from a dealers contract?"

To which question witness was permitted to testify and did testify: "A dealers contract is a contract between two dealers when no specific ground is mentioned. He can either raise the hops himself or go out on the market and buy them, or get them given to him, —any way, as long as he produces the identical amount as specified in the contract. A dealer's contract is one which covers an obligation to deliver a definite quantity of hops at all hazards. A regular grower's contract has

a clause in it to the effect that an unfavorable season that could not be prevented by him, he is responsible for no more hops that he has title to on the yard, and that he grows." (Bill of Exceptions, pp. 24-25; p. 60 *supra.*)

18.

The court erred in overruling plaintiff's objection to the admission in evidence of the telegram received by the witness W. J. Bishop from plaintiff in answer to defendants' Exhibit 2 (Assignment of Error 11, p. 109, *supra*), the same being received and marked Exhibit 3, and is as follows:

"Bishop Bros. Chicago, Ill.,
McMinville, Oregon. January 24, 1917.

We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample.

A. Magnus Sons Company."

And in this regard plaintiff states that the contract sued upon was prepared and written by said witness W. J. Bishop, one of the defendants herein, after the exchange of said telegrams, and is definite, certain and unambiguous, and said contract is admitted by the defendants in their answers filed herein (Bill of Exceptions, pp. 25-26; p. 61 *supra.*)

19.

The court erred in denying plaintiff's motion sepa-

rately to strike out Exhibit 2 and Exhibit 3. And in this regard plaintiff states that Exhibit 2 is a telegram dated January 24, 1917, addressed to plaintiff and signed "Bishop Bros.", the same being set out in full in Assignment 11, p. 169, *supra,* and Exhibit 3 is a telegram dated January 24, 1917, addressed to "Bishop Bros.", signed by plaintiff, the same being set out in full in Assignment 18, p. 113, *supra,* and the contract sued upon, which is admitted by defendants in their answers herein, is between plaintiffs and defendants Adam Orey and W. J. Bishop (Bill of Exceptions, p. 26; p. 62 *supra.*)

20.

The court erred in overruling plaintiff's objections to the following question propounded to A. C. Bishop:

"Q. And what were you instructed to do by your brother in connection with that trip?"

And in this regard plaintiff states that said witness is a brother of W. J. Bishop, one of the defendants herein, and was called to testify in relation to a trip which he made to New York and Chicago in December, 1916, and to conversations with plaintiff in Chicago in January. 1917, prior to the execution of the contract sued upon in this case; and said witness was permitted to testify and did testify in answer to said question as follows: "I had a number of hops under my arm—samples, and order to sell: also had orders to sell some contracts, which was grown on Orey and Bishop's yards, and other yards, to sell them to dealers in the East. If they were in position to take them I would have closed the deal right there, and did close a couple of deals. By

closing a deal I mean arranging a contract and wiring my brother, and the taking care of it, and taking it up direct with them." (Bill of Exceptions, pp. 31-32; p. 68 *supra.*)

21.

The court erred in overruling plaintiff's objection to the following question propounded to said witness A. C. Bishop:

"Q. And what do you mean by contract hops? What was the nature of your conversation? State to the court and jury what took place?"

And in respect thereto plaintiff says that said A. C. Bishop was called as a witness on behalf of defendants to testify to a conversation he had with plaintiff's officers in Chicago relative to the sale of hops in January, 1917, prior to the execution of the written contract in suit, which is admitted by the defendants. Said witness was permitted to testify and did testify in answer to said question, as follows: "I went in there with the intention of selling them some spot hops—I think I did; and also asked them if they were interested in contracts, which they were, at the present time" (Bill of Exceptions, pp. 32-33; p. 69 *supra.*)

22.

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop, a witness called on behalf of defendants:

"Q. And was there any conversation in regard to what these yards were, or your brother's connection with those yards?"

Respecting this plaintiff says said witness was called by the defendants to testify to a conversation between himself and plaintiff's officers relative to a sale of hops by defendants to plaintiff held prior to the execution of the written contract sued upon, and said witness was permitted to testify and did testify, in answer to the above quoted question: "No, sir; only that they were my brother's yards. I didn't know which ones that he was going to sell them." (Bill of Exceptions, p. 33; p. 70 *supra.*)

23

The court erred in overruling plaintiff's objection to the following question propounded by A. C. Bishop:

"Q. Was there any conversation in regard to the ownership of these yards?"

And thereabouts plaintiff states that said witness was called on behalf of defendants to testify to a conversation between witness and plaintiff's officers which occurred prior to the making of the written contract sued upon, relative to the sale of hops, and said witness was permitted to testify, and did testify, in answer to said question: "Yes, sir; I told them the yards yere leased." (Bill of Exceptions, p. 33; p. 70 *supra.*)

24

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop:

"Q. What were the terms you told them?"

And in this regard plaintiff states that said A. C. Bishop was called as a witness for defendants to testify to his conversation with plaintiff's officers prior to the

preparation of the written contract by defendant W. J. Bishop, which is the contract sued upon in this case, and said witness was permitted to testify and did testify: "I told them specifically that we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals." (Bill of Exceptions, p. 34; p. 70 *supra.*)

25

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop:

"Q. For how much rent?"

Respecting which plaintiff states that said witness was called on behalf of defendants to relate his conversation with plaintiff's officers leading up to the execution of the written contract for the sale of hops upon which plaintiffs began this action. And said witness was permitted to testify and did testify in answer to said question: "One-quarter rental." (Bill of Exceptions, p. 34; p. 71 *supra.*)

26

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop:

"Q. And what was the nature of that communication?"

In regard to which plaintiff states that said A. C. Bishop was called as a witness for defendants to testify to his conversation with plaintiff's officers in Chicago, Ill., prior to the execution of the written contract in suit, and had testified that as a result of that conversation he communicated with his brother, W. J. Bishop, one of the

defendants. The witness was permitted to testify and did testify, in answer to said question, as follows: "I wired him I was leaving for home that evening, and that Magnuses were interested in term contracts and to take it up direct." (Bill of Exceptions, pp. 34-35; p. 71 *supra.*)

27

The court erred in overruling plaintiff's objection to the following question propounded to R. H. Wood:

"Q. Is there a distinction in the hop business between a grower's contract, so-called, and what is known as a dealer's contract?"

And thereabouts plaintiff says that said witness was called as an expert in the hop business to testify to the customs and usages and meaning of terms used in the hop business in Oregon, and was permitted to testify and did testify in answer to said question: "Yes, there is." (Bill of Exceptions, p. 21; p. 77 *supra.*)

28

The court erred in overruling plaintiff's objection to the following question propounded to R. H. Wood:

"What is the fundamental difference between the two contracts?"

In respect of which plaintiff states that said witness was called by defendants as an expert to testify relative to the customs and usages of the hop business in Oregon and the meaning of terms used therein, and was permitted to testify and did testify in answer to said question: "A dealer's contract specifies a certain amount of pounds to be delivered and quality likewise, off any

yard, irrespective of where the hops come from." (Bill of Exceptions, p. 40; p. 78 *supra.*)

29

The court erred in sustaining defendant's objection to plaintiff's question propounded to W. J. Bishop as to what was the market price of hops in 1918.

And in regard to this plaintiff states that said witness is one of the defendants who was recalled in his own behalf to testify to the amount of hops produced by defendants on said lands in 1918, and had testified that they had harvested 40,000 pounds of the crop and left 40,000 pounds in the yards unpicked. Plaintiffs offered to prove by said witness by said question that the market price of hops in 1918, the only year under the various contracts between plaintiff and defendants when the said yards produced as much as 80,000 pounds of hops, was as low or lower than the contract price, and during all the other years under said contracts, when the production of said yards was under 60,000 pounds, the market price of hops was very much higher than the contract price. (Bill of Exceptions, pp. 41-42; p. 79 *supra.*)

30

The court erred in refusing plaintiff's request to instruct the jury as follows:

> "The contract sued upon required the delivery by defendants to plaintiff of the crop of hops raised and grown by defendants upon the lands therein described in the year 1919. It is admitted that the defendants raised and grew 38,429 pounds of prime

hops on said lands in 1919, that 28,822 pounds thereof have been delivered according to contract, and that defendants have failed and refused to deliver 9607 pounds thereof. It is undisputed that the market price of hops of said quality at Salem, Oregon, on October 31, 1919, was 85 cents per pound. I instruct you to return a verdict for the plaintiff and against the defendants for $6628.83, the same being the value of said 9607 pounds of hops at 85 cents per pound, less the contract price of 16 cents per pound, or 69 cents per pound, together with interest on said sum from October 31, 1919, at the rate of six per cent per annum."

And in regard to this plaintiff states that the contract sued upon was admitted by the defendants; that it was prepared and written by them and forwarded to plaintiff, who accepted and signed the same as written; that it is definite, certain and unambiguous and the facts recited in said requested instruction were stipulated and agreed to upon the trial of said cause. (Bill of Exceptions, pp. 57-58; p. 98 *supra.*)

31

The court erred after refusing plaintiff's request for the instruction set out in Assignment 30 in refusing plaintiff's request to give the following special charge to the jury, to-wit:

"The jury is instructed that, if they find from the evidence that the plaintiff knew before this contract was entered into that Bishop and Orey made or intended to make a contract of sale of hops to

be raised and grown on a farm or lands rented by them on a crop rental, reserving one-fourth of the crop as rent, it will be their duty to return a verdict for the defendants; but if, on the other hand, the jury are satisfied from the evidence that A. Magnus Sons Company did not know that Bishop and Orey were contracting with reference to hops to be raised and produced on leased land, or if plaintiff did not know the terms and conditions of that lease, it would be the duty of the jury to return a verdict for the plaintiff."

And in regard to this plaintiff states that A. C. Bishop, a witness for the defendants, testified that in a conversation with plaintiff's officers in Chicago, Ill., in January, 1917, prior to the making of the written contract in suit, he told plaintiff's officers that defendants' yards were leased on crop rentals of one-quarter of the crop (Bill of Exceptions, pp. 33, 34; Assignments of Error Nos 23, 24 and 25; pp. 116-117 *supra*); that August Magnus, one of the officers of plaintiff, with whom said A. C. Bishop held said conversation, testified that nothing was mentioned in said conversation or elsewhere, or at all, with reference to the plaintiff receiving anything else than the entire output of hops upon the land specified in the contract up to 60,000 pounds, nor was anything said which would lead plaintiff to believe that it was to receive anything less than the entire output of hops of the parcel of land specified up to 60,000 pounds; that he knew the land specified in the contract was leased land, but he knew nothing about the terms and conditions of the lease, nor that defendants were

to have three-quarters of the output as their share of the crop, nor that the landlord was to have one-quarter as his rental, and that he had no information with reference to whether defendant had a crop lease or a cash lease of the lands. (Bill of Exceptions, pp. 58-59; p. 99 *supra.*)

32

The court erred in granting defendant's request to direct a verdict in favor of the defendants, and in giving the following instruction to the jury, namely: "Now, gentlemen of the jury, it becomes my duty in this case to direct you to return a verdict in favor of defendants. The verdict is, in form, as follows: We, the jury empaneled in the above entitled court and cause, under the direction of the court, return our verdict for the defendants and against the plaintiff."

And in regard to this plaintiff states that this action was brought for damages for the breach by defendants of a written contract for the sale and delivery to plaintiffs of the crop of hops to be grown in 1919 by defendants on certain lands therein described; that defendants proposed said sale and delivery and prepared and wrote the contract and forwarded the same to plaintiff, who accepted and signed the same as prepared by defendants; that said contract is definite, certain and unambiguous; that its execution as alleged in the complaint was admitted by defendants; that on the equity side of the above entitled court, prior to the trial of this cause, defendants attempted to have the said contract reformed so as to change their agreement to sell and deliver to plaintiff the entire crop of hops grown on said lands in 1919 to

an agreement to sell and deliver only three-fourths of such crop, and the said court entered a decree denying such relief; that the only issue that remained for trial in this case, when the same was remanded to the law side, was the amount of the crop grown and harvested by defendants on said lands in 1919 and the market price of hops at Salem, Oregon, on October 31, 1919; that it was stipulated and agreed during the trial that the total crop was 38,429 pounds, of which defendants delivered to plaintiff only 28,882 pounds, and had failed and refused to deliver 9607 pounds thereof, and that the market price of said hops at Salem, Oregon, on October 31, 1919, was 85 cents per pound. (Page 99 *supra.*)

Wherefore, plaintiff prays that the said judgment be reversed and that a judgment be rendered herein by the Honorable Circuit Court of Appeals for the Ninth Circuit in favor of plaintiff and against defendants for the difference between the contract price of 16 cents per pound and the market price of 85 cents per pound of 9607 pounds of hops, to-wit, the sum of $6628.83, together with the costs and disbursements of said action and of this review.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

Due service of the foregoing Assignment of Errors is hereby accepted at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Of Attorneys for Defendants.

And thereafter the Judge of said Court made, signed, filed and entered the following

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF BOND

On this 7th day of July, 1922, came plaintiff, by Thomas G. Greene of counsel, and filed herein and presented to this court its petition praying for the allowance of a writ of error, and therewith its assignment of errors intended to be urged by it, and also praying that the amount of the supersedeas bond to be given by it be fixed and that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, it is ORDERED that said Writ of Error be and the same is hereby allowed as prayed for upon the plaintiff giving a bond as provided by law in the penal sum of $500.00; and that further proceedings in said cause in this court be suspended pending the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. WOLVERTON,
District Judge.

And thereafter said court approved and there was filed the following

BOND ON WRIT OF ERROR

KNOW ALL MEN BY THESE PRESENTS, that we, A. Magnus Sons Company, a corporation, as principal, and Fidelity & Deposit Co. of Md., as surety, are held and firmly bound unto Adam Orey and W. J. Bishop in the sum of Five Hundred Dollars to be paid to the said Adam Orey and W. J. Bishop, their heirs. executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed and sealed this 7th day of July, 1922.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Oregon, sitting at Portland in said District, in a suit pending in said court between A. Magnus Sons Company, a corporation, as plaintiff, and Adam Orey and W. J. Bishop as defendants, on the law docket of said court, final judgment was rendered against the said A. Magnus Sons Company that it take nothing by its complaint therein and in favor of said defendants for the sum of $56.60, and the said A. Magnus Sons Company has obtained a writ of error to reverse said judgment, and a citation directed to the said Adam Orey and W. J. Bishop, defendants in error, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California according to law within thirty days from the date of the service of said citation:

Now, the condition of the above obligation is such

that if the said A. Magnus Sons Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF, A. Magnus Sons Company, a corporation, has caused these presents to be executed by its attorney, Thomas G. Greene, thereunto duly authorized, and the said Surety has caused these presents to be executed by its
thereunto duly authorized, the day and year last above written.

A. MAGNUS SONS COMPANY,
By Thomas G. Greene,
Its Attorney.
FIDELITY & DEPOSIT CO. OF MD.
By Clarence D. Porter,
Its Attorney in Fact.

Corporate seal.

Service of the within bond by receipt of a duly certified copy thereof is accepted at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

And on July 7, 1922, there was issued and filed the following:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

A. Magnus Sons Company,
a corporation,

Plaintiff,

vs.

Adam Orey and W. J. Bishop,

Defendants.

WRIT OF ERROR
(Copy)

UNITED STATES OF AMERICA,)
State and District of Oregon,)ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to the Honorable Judges of the District Court of the United States for the District of Oregon: GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable CHARLES E. WOLVERTON, one of you, between A. MAGNUS SONS COMPANY, a corporation, plaintiff and plaintiff in error, and ADAM OREY and W. J. BISHOP, defendants and defendants in error, a manifest error hath happened to the damage of A. Magnus Sons Company, plaintiff in error, as by said complaint doth appear; and we, being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States this the 7th day of July, A. D. 1922.

G. H. MARSH,
Clerk of the District Court
of the United States for the
District of Oregon.

(Seal of Court)

I HEREBY CERTIFY that copies of the within Writ of Error were, on the 7th day of July, 1922, lodged in the office of the Clerk of the District Court of the United States for the District of Oregon, for the said defendants in error.

G. H. MARSH,
Clerk of the District Court of
the United States for the Dis-
trict of Oregon.

(Seal of Court)

Due and legal service in Multnomah County, Ore-

gon, of the within Writ of Error upon the above named defendants and each of them is hereby admitted and accepted this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

A. MAGNUS SONS COMPANY,
a corporation,
Plaintiff,

vs.

ADAM OREY and W. J. BISHOP,
Defendants.

CITATION ON WRIT OF ERROR (Copy)

United States of America,)
State and District of Oregon)ss.

To Adam Orey and W. J. Bishop, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the 7th day of July, 1922, pursuant to a writ of error on file in the office of the Clerk of the District Court of the United States for the District of Oregon, in that certain action wherein A. Magnus Sons Company, a corporation, is plaintiff, and you, Odam Orey and W. J. Bishop, are defendants in error, to show cause, if any there be, why the judgment given, made and entered in favor of

the said Adam Orey and W. J. Bishop, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Chas. E. Wolverton, United States District Judge for the District of Oregon, this 7th day of July, 1922, and of the independence of the United States the one hundred and forty-fifth.

CHAS. E. WOLVERTON,
District Judge.

Service of the foregoing citation by receipt of duly certified copies thereof is hereby accepted for both of said defendants at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

A. Magnus Sons Company,
a Corporation,
Plaintiff,

vs.

Adam Orey and W. J. Bishop,
Defendants.

AMENDED STIPULATION

In lieu of stipulation heretofore on July 7, 1922, signed and filed herein, it is now hereby stipulated by

and between the parties by their respective attorneys, as follows:

1. That the Trainscript of Record on Writ of Error in said cause shall consist of the following:

Complaint

Answer

Motion to Strike Parts of Answer and Demurrer to Answer

Opinion of Court Thereon

Order Allowing Motion and Sustaining Demurrer

Amended Answer

Reply

Order Denying Reformation, Dismissing Affirmative Answer and Remanding Cause to Law Side

Judgment Order

Bill of Exceptions

Petition for Writ of Error

Assignment of Errors

Order Allowing Writ of Error and Fixing Amount of Bond

Bond on Writ of Error.

Writ of Error

Citation

This Stipulation

Clerk's Certificate.

2. That in printing said Transcript of Record the caption, title, clerk's endorsements of filing of papers and other formal matters may be omitted.

3. That said Transcript may be certified by the clerk of said court without comparing the aforesaid documents and papers printed therein with the originals

thereof, such comparisons being hereby waived.

4. That an order may be entered herein, on the application of plaintiff in error, enlarging the time within which to file the record and docket the above entitled cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to and inclusive of the 31st day of August, 1922.

July 14, 1922.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff in Error.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants in Error.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

A. MAGNUS SONS COMPANY,
a corporation,
Plaintiff,

vs.

ADAM OREY and W. J. BISHOP,
Defendants.

CERIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America)
)ss.
District of Oregon.)

I, G. H. Marsh, Clerk of the above entitled court, hereby certify that the foregoing record consisting of printed pages numbered from 1 to 134 inclusive, presents a full, true and correct copy of the proceedings had and orders entered in the above entitled cause as therein stated, as the same appear of record and on file in my office, and as required in the stipulation of counsel for the parties in lieu of praecipe filed and shown therein; and that the same constitutes the entire record of the proceedings in said cause as the same appear in my office and official custody, except the original Writ of Error and Citation which are attached to and transmitted herewith.

In accordance with stipulation of counsel for the parties, set out in the foregoing Transcript, this record

is certified to by me without comparison of the papers and proceedings printed therein with the originals thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at my office in the City of Portland, State of Oregon, this —— day of August, 1922.

.....

Clerk.